# Petition

81-772

No.

Office-Supreme Court, U.S.
FILED
OCT 22 1981
ALEXANDER L. STEVAS,
CLERK

# In the Supreme Court of the United States

OCTOBER TERM 1981

THE READER'S DIGEST ASSOCIATION, INC.,
a corporation,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

NOBLE K. GREGORY
Counsel of Record
WILLIAM I. EDLUND
CHARLES R. RAGAN
KEVIN M. FONG
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1177
*Counsel for Petitioner*

DAVID OTIS FULLER, JR.
WILLIAM S. BUSKER
200 Park Avenue
New York, N.Y. 10166

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
*Of Counsel*

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

## QUESTIONS PRESENTED

1. Are defendants charged with violations of cease and desist orders to be denied *any* hearings to resolve factual disputes as to whether or not their conduct violated those orders, as the Third Circuit held in the instant case, or are they entitled to such hearings, as the Second Circuit has held (*United States v. J. B. Williams Company, Inc.* (2 Cir. 1974) 498 F.2d 414)?

2. Does the ruling below violate the Due Process Clause in denying defendants in civil penalty proceedings *any* opportunity to have factual disputes resolved in either an administrative or judicial hearing?

3. Under § 5(l) of the Federal Trade Commission Act (which authorizes a $10,000 penalty for "each violation" of an FTC order), if defendants are charged with violating orders proscribing dissemination of certain advertisements, are the number of violations to be determined by the number of disseminations of the advertisements in question or by the number of copies of the advertisements disseminated in a single mailing, broadcast, or press run?*

---

*The parties are named in the title of this petition. Petitioner has no parent. Its only publicly owned subsidiary is The Reader's Digest Association (Canada) Ltd.

TABLE OF CONTENTS


| | Page |
|---|---|
| Questions Presented | i |
| Opinions Below | 1 |
| Jurisdiction | 1 |
| Statutory Provisions Involved | 2 |
| Statement of the Case | 2 |
| Reasons for Granting Certiorari | 5 |
| I. In holding that whether a defendant has violated a cease and desist order is a question of law which may be decided without affording the defendant an opportunity to have factual disputes resolved by a trier of fact, the Third Circuit has created a conflict with the Second Circuit and has interpreted the FTC Act in violation of the Due Process Clause of the Fifth Amendment | 7 |
| A. This case presents an important conflict between the Circuits on an issue affecting the rights of defendants in civil penalty proceedings brought by the Federal Government | 7 |
| B. The ruling below denies any opportunity to have factual disputes resolved in a hearing, either administrative or judicial, in violation of the Due Process Clause | 10 |
| II. The ruling below—that a publisher who in six bulk mailings distributes 17 million copies of two advertisements which allegedly violate a consent order has committed 17 million separate violations, each of which is subject to a penalty of $10,000—is contrary to the intent of Congress in enacting the FTC Act, as well as cases interpreting the FTC Act and similar statutes | 14 |
| Conclusion | 20 |

# TABLE OF AUTHORITIES


| Cases | Pages |
|---|---|
| Bell v. United States, 349 U.S. 81 | 18, 19 |
| Beneficial Corp. v. F. T. C., 542 F.2d 611 | 11 |
| Continental Baking Company v. Dixon, 283 F.Supp. 285 | 13 |
| Ewing v. Mytinger & Casselberry, 339 U.S. 594 | 12 |
| F. T. C. v. Lukens Steel Co., 454 F.Supp. 1182 | 9 |
| Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 | 12 |
| F.T.C. v. Standard Oil Company of California, ..... U.S. ....., 101 S.Ct. 488 | 13 |
| Federated Nationwide Wholesalers Service v. F. T. C., 398 F.2d 253 | 19 |
| Fibersheim, In re, 316 F.2d 423 | 11 |
| London v. Everett H. Dunbar Corporation, 179 Fed. 506 | 18 |
| N.L.R.B. v. Dell, 309 F.2d 867 | 9 |
| Piuma v. United States, 126 F.2d 601 | 9, 17 |
| United States v. Bestline Products Corp., 412 F.Supp. 754 | 9 |
| United States v. Bostic, 336 F.Supp. 1312 | 9 |
| United States v. Golden Fifty Pharmaceutical Co., Inc., 421 F.Supp. 1199 | 9 |
| United States v. St. Regis Paper Company, 355 F.2d 688 | 13, 19 |
| United States v. Vulcanized Rubber & Plastics Company, 288 F.2d 257 | 11-12 |
| United States v. Western Pacific Railroad Company, 385 F.2d 161 | 9 |

## Table of Authorities


### Cases — Pages

United States v. J. B. Williams Company, Inc., 354 F.Supp. 521 ..... 17

United States v. J. B. Williams Company, Inc., 498 F.2d 414 ..... i, 4, 5, 7, 8, 9, 10, 16-17

### Constitution

United States Constitution

First Amendment ..... 6, 19

Fifth Amendment (Due Process Clause) ..... 5, 7, 10, 12

### Statutes

United States Code

Title 7, § 215 ..... 7

Title 15, § 45 (FTC Act, § 5) ..... passim

Title 15, § 56 (FTC Act, § 16) ..... 2, 13, 14

Title 15, § 291 ..... 17

Title 15, § 1233(a) ..... 17

Title 18, § 2421 ..... 18

Title 28, § 1254(1) ..... 1-2

Title 28, § 1291 ..... 4

Title 35, § 292 ..... 18

Title 49, § 11901 ..... 7

### Other Authorities

Administrative Conference of the United States, 1979 Report (April 1980) p. 56 ..... 7, 10

Annual Report of the Federal Trade Commission (1979) pp. 16-23, 26-29 ..... 6

79 Columbia Law Review (1979) 1435 (Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies) ..... 7, 12, 14

Pages

Hearings before the Committee on Interstate Commerce on S. 3744, 74th Cong., 2d Sess., p. 21 (Feb. 21, 1936) ..... 16

60 Iowa Law Review (1974) 378 (Comment, The Right to a Jury Trial in FTCA Section 5(1) Civil Penalty Actions) ..... 12, 14

Report of the Senate Committee on Commerce on S. 356, S.Rept. 93-151, 93d Cong., 1st Sess., p. 27 (May 14, 1973), reproduced in CCH Trade Reg.Rep., No. 73 (May 21, 1973) ..... 16

No.

# In the Supreme Court of the United States

OCTOBER TERM 1981

THE READER'S DIGEST ASSOCIATION, INC.,
a corporation,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

## Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

### OPINIONS BELOW

The majority and concurring opinions and the judgment of the Court of Appeals for the Third Circuit, dated August 24, 1981, are printed in Appendix A. The order and the dissenting opinion on denial of rehearing in banc are printed in Appendix B. The opinions of the district court ((D.Del. 1978) 474 F.Supp. 1037; (D.Del. 1980) 494 F.Supp. 770) are printed in Appendix C and Appendix D.

### JURISDICTION

The opinions and the judgment of the Court of Appeals for the Third Circuit were filed and entered on August 24, 1981 (Appx. A), and its order denying rehearing was filed and entered September 16, 1981 (Appx. B). This Court

has jurisdiction pursuant to § 1254(1) of Title 28 of the United States Code.

## STATUTORY PROVISIONS INVOLVED

This case involves § 5 of the Federal Trade Commission Act (15 U.S.C. § 45), commonly known as the FTC Act; the pertinent provisions of that section and § 16 of the Act (15 U.S.C. § 56) are set forth in Appendix E.

## STATEMENT OF THE CASE

Petitioner, The Reader's Digest Association, Inc. ("Reader's Digest"), is a publisher which promotes its magazines and other publications through the use of sweepstakes (Appx. C, p. C-38). As part of a 1973 sweepstakes promotion, Reader's Digest distributed as an advertising packet a "sweepstakes passport" which included pictures of an item labeled "Travel Check"; a 1974 sweepstakes promotion contained advertising copy including pictures of items labeled "Cash-Convertible Bond" (Appx. C, p. C-42). These advertisements were distributed in a total of six bulk mailings; in those six bulk mailings, nearly 17 million packets containing copies of the items in question were sent (Appx. D, pp. D-68 to D-69).[1]

Without *any* administrative hearing, the United States Attorney for the District of Delaware brought this action. He alleged that Reader's Digest had caused these promotional packets to be disseminated in violation of a consent

1. The district court found, as the Government had urged, that more than 17 million packets had been mailed. In considering Reader's Digest's motion for relief from the judgment, the district court later conceded, as the evidence required, that in fact 16,100,820 items had been mailed during the six bulk mailings (Appx. A, p. A-6, n. 3). We will assume in this petition that nearly 17 million items were mailed.

order that Reader's Digest and the Federal Trade Commission had agreed to in 1971 (Appx. D, p. D-66). The consent order, in pertinent part, required Reader's Digest to cease and desist from

> "[u]sing or distributing simulated checks, currency, 'new car certificates;' or using or distributing any confusingly simulated item of value" (Appx. A, p. A-3).

The district court ruled that the consent order's prohibition of "confusingly simulated item[s] of value" proscribed items having "the same capacity or tendency to mislead consumers" as the items mentioned in the 1971 administrative complaint which had been lodged when the parties agreed to the consent order (Appx. C, p. C-47). The district court then determined, without any affidavit or testimonial evidence from the Government, that the "travel check" had that capacity (Appx. C, p. C-64) and that the "cash-convertible bond" possessed a comparable tendency to deceive (Appx. C, pp. C-65).[2]

The Government then sought and obtained a $1.75 million penalty on the basis that each of the promotional packets mailed by Reader's Digest constituted a separate violation of the consent order (Appx. D). The district court ruled that each individual envelope constituted a separate violation, for which a maximum penalty of $5,000 or $10,000 each (depending on the time of distribution) or a maximum allowable penalty of billions of dollars (Appx. D, pp. D-71, D-69, n. 11) could be imposed. The court also issued a permanent injunction against further violations of the consent order (Appx. D, p. D-48).

---

2. The record showed, however, that neither Reader's Digest nor the FTC had received any complaint from any person about either the sweepstakes passport containing the so-called "travel check" pictures or the promotional packets containing the "cash-convertible bond" advertising copy.

A timely appeal was taken to the Court of Appeals for the Third Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. The Court of Appeals affirmed, holding that the issue of whether the items in question violated the order presented two distinct issues, each of which was solely a question of law: 1) how the consent order should be interpreted;[3] and 2) whether the items in question fell within the order's proscription as interpreted (Appx. A, p. A-7).

As to the second issue, the Third Circuit announced a rule of law that a defendant is not entitled to any hearing, either administrative or judicial, to present evidence showing that the items in question did not in fact violate the FTC order. In so doing the Third Circuit expressly acknowledged that its rule was directly contrary to the decision of the Second Circuit in *United States v. J. B. Williams Company, Inc.* (2 Cir. 1974) 498 F.2d 414 (Appx. A, p. A-13); it rejected the Second Circuit's *Williams* decision that whether an item comes within the scope of a prior order (as interpreted) is a "question * * * for the trier of the facts, to be decided after hearing all material evidence" (498 F.2d 431).

The Court of Appeals also agreed with the district court that each item in a bulk mailing that is deemed offensive constitutes a separate violation for which the statutory maximum penalty is permissible (Appx. A, p. A-19). The Third Circuit recognized that its holding "give[s] rise to the possibility of enormous potential liability" amounting to billions of dollars, but was content that penalties actually imposed would be subject to review for abuse of judicial discretion (Appx. A, p. A-22).

---

3. Reader's Digest does not challenge the Court of Appeals' ruling that the first issue—interpretation of the order—presents a question of law.

On September 16, 1981, the Court of Appeals denied a petition for rehearing; Judges Adams, Aldisert and Weis voted to grant a rehearing in banc (Appx. B).

## REASONS FOR GRANTING CERTIORARI

The Third Circuit's holding—that whether a defendant has violated a cease and desist order is solely a question of law to be decided without affording the defendant an opportunity to have factual disputes resolved in either an administrative hearing or a trial—not only creates a serious conflict with the decision of the Second Circuit in *United States v. J. B. Williams Company, Inc.* (2 Cir. 1974) 498 F.2d 414, but also results in a blatant violation of rights under the Due Process Clause of those defendants who may be sued in the Third Circuit.

Contrary to the Second Circuit's *Williams* decision—that violation of a cease and desist order may present questions of fact and that a defendant is entitled to a trial on those issues in a civil penalty proceeding—the Third Circuit has held that the Government may recover civil penalties in a district court *without any factual hearing, administrative or judicial, to determine whether there was in fact a violation of a cease and desist order.* Unless this conflict is resolved by this Court, a defendant in the Third Circuit charged with violating a cease and desist order will be denied any hearing at which defendant may show that the order was not violated—an opportunity which defendants in the Second Circuit have as a matter of right. This important question of constitutional law alone would merit this Court's review.

The second ruling below has equally broad portents. If left unreviewed, the precedent that an advertiser who distributes 17 million copies of an advertisement commits 17

million separate violations, each of which may be subject to a $10,000 penalty, will have a chilling effect on publishers and advertisers. By converting the act of publishing a single advertisement into millions of offenses, the Government will have the power to threaten publishers and advertisers with civil penalties in the billions of dollars. As the dissenting judges pointed out on denial of rehearing in banc, a newspaper with a circulation of 100,000 would be subject to a maximum civil penalty of $1 billion if, as the court below holds, each of the individual 100,000 copies of the newspaper constitutes a separate violation warranting a $10,000 maximum penalty. Without assurance that the Government will not seek even a fraction of the maximum penalties, publishers and advertisers will decline to risk distribution of *any* publications or advertisements. The chilling effect of such a precedent upon the First Amendment rights of publishers and advertisers is indisputable; because of the enormous potential penalties, publishers and advertisers in the future will be deterred from distributing constitutionally protected commercial advertisements, whether or not it has any capacity to mislead.

Equally important, as a practical matter, newspapers, television and radio stations, publishers and advertisers will simply refuse to settle disputes with Federal agencies because orders concerning advertising practices might later subject them to enormous potential liability. Thus, consent decrees essential to the administration and enforcement of the nation's regulatory laws[4] will be shunned by publishers and advertisers.

---

4. In the fiscal year ending September 30, 1979, the most recent year for which statistics are available, the FTC issued 85 consent agreements (see Annual Report of the Federal Trade Commission (1979) pp. 16-23, 26-29).

Clearly the issues presented are of crucial importance to the administration of justice, to publishers and advertisers throughout the country, and to all defendants in civil penalty proceedings brought by the Government under the FTC Act or other similar statutes (e.g., 7 U.S.C. § 215 (Packers and Stockyards Act); 49 U.S.C. § 11901 (Interstate Commerce Act)).[5]

## I. IN HOLDING THAT WHETHER A DEFENDANT HAS VIOLATED A CEASE AND DESIST ORDER IS A QUESTION OF LAW WHICH MAY BE DECIDED WITHOUT AFFORDING THE DEFENDANT AN OPPORTUNITY TO HAVE FACTUAL DISPUTES RESOLVED BY A TRIER OF FACT, THE THIRD CIRCUIT HAS CREATED A CONFLICT WITH THE SECOND CIRCUIT AND HAS INTERPRETED THE FTC ACT IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

### A. This case presents an important conflict between the Circuits on an issue affecting the rights of defendants in civil penalty proceedings brought by the Federal Government.

The issue—whether defendants charged with violation of cease and desist orders are entitled to hearings, either administrative or judicial, to resolve factual disputes—is of crucial importance to both defendants and administrative agencies throughout the country.

In holding that whether a defendant has violated an FTC cease and desist order presents only a question of law, the Third Circuit expressly refused to follow the decision of

---

5. "The civil money penalty has become one of the most widely used techniques in the enforcement programs of Federal administrative agencies" (1979 Report, Administrative Conference of the United States (Apr. 1980) p. 56). There are more than 300 statutory civil penalties enforced by 27 Federal departments and independent agencies (Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum.L.Rev. (1979) 1435, 1438, 1486-1487).

the Second Circuit in *United States v. J. B. Williams Company, Inc.* (2 Cir. 1974) 498 F.2d 414. In *Williams*, the Second Circuit specifically held that whether an accused advertisement comes within an FTC cease and desist order is an issue of fact (498 F.2d 432). J. B. Williams, like Reader's Digest, asserted that its advertisements were not within the scope of the FTC cease and desist order.[6] The Second Circuit rejected the district court's conclusion that it could be determined as a matter of law whether a challenged advertisement falls within the scope of the prohibitions in a cease and desist order (498 F.2d 431); instead, it held:

> "• • • when the meaning or effect of words or acts is fairly disputed, the question is for the trier of the facts, to be decided after hearing all the material evidence" (ibid.).

The Second Circuit ruled that the district court must conduct a trial to resolve factual disputes, even though in that case the administrative agency itself had conducted a hearing prior to commencing the civil penalty action in district court (498 F.2d 419). A fortiori, the Second Circuit's holding, if applied to the case at bar, would require

---

6. In *Williams*, the defendant sought a jury trial; thus, the district court's erroneous judgment was reversed and remanded for a jury trial (498 F.2d 439). The right to a jury trial in a civil penalty action for violation of a cease and desist order may be the subject of conflicting views. While the Second Circuit recognizes a right to jury trial (498 F.2d 414), the Third Circuit's ruling does not (Appx. A, pp. A-13 to A-15), in part because of concern that the interposition of a jury in civil penalty proceedings would raise serious questions about potential delays in enforcement of FTC consent orders (Appx. A, p. A-14). Reader's Digest did not seek a jury trial, but it does urge that a hearing—either administrative or judicial—is required on the issue of whether its advertisements fall within the scope of the order.

a district court trial, since Reader's Digest—unlike the Williams company—*was never afforded a hearing before the administrative agency on the alleged violations of the order.*

The Second Circuit's holding in *Williams* has been followed by District Courts in the Fourth, Seventh, Ninth and District of Columbia Circuits (*United States v. Bostic* (D.S.C. 1971) 336 F.Supp. 1312, affirmed (4 Cir. 1972) 473 F.2d 1388; *United States v. Golden Fifty Pharmaceutical Co., Inc.* (N.D.Ill. 1976) 421 F. Supp. 1199, 1202; *United States v. Bestline Products Corp.* (N.D.Cal. 1976) 412 F. Supp. 754, 780; *F.T.C. v. Lukens Steel Co.* (D.D.C. 1978) 454 F.Supp. 1182, 1187)[7] and is consistent with the reasoning of the Ninth Circuit in *Piuma v. United States* (9 Cir. 1942) 126 F.2d 601.[8] The Second Circuit's holding in *Williams* is also amply supported by cases holding that in order to obtain a judgment of contempt, an administrative agency must demonstrate that its order has been violated; a judgment of contempt for violation of a cease and desist order can "be based only upon proven facts" (*N.L.R.B. v. Dell* (5 Cir. 1962) 309 F.2d 867, 869; see also cases cited in *United States v. J. B. Williams Company, Inc.* (2 Cir. 1974) 498 F.2d 414, 429).

---

7. See also *United States v. Western Pacific Railroad Company* (10 Cir. 1967) 385 F.2d 161, where the Tenth Circuit stated that, in a civil penalty action brought under the Interstate Commerce Act for violation of an ICC order, any defenses "must be developed at the trials on the merits" and that the court's decision would "depend on the facts developed at the trials" (385 F.2d 163).

8. In *Piuma*, the Ninth Circuit assumed that in a civil penalty action the Government must prove facts showing a violation of a cease and desist order (126 F.2d 603). A trial must be conducted unless, as in *Piuma*, the defendant admits all the Government's necessary factual allegations (ibid.).

Contrary to the holdings of these courts, the Third Circuit now creates a rule of law that the Government may obtain substantial penalties for violation of a cease and desist order without having to prove the facts to establish such a violation: those allegations may be taken as true without any evidence. The result of this conflict will be chaotic; a defendant's rights in a civil penalty action will depend solely upon whether the Government can establish jurisdiction within the Third Circuit.

**B. The ruling below denies any opportunity to have factual disputes resolved in a hearing, either administrative or judicial, in violation of the Due Process Clause.**

The ruling below, endorsing as it does the imposition of a $1,750,000 civil penalty without affording a defendant an opportunity to have factual disputes relating to liability resolved in an evidentiary hearing—either administrative or judicial—is also contrary to fundamental principles of due process. As pointed out by the 1979 Report of the Administrative Conference of the United States (Apr. 1980) p. 59:

> "Respondents in civil money penalty cases have a right to a trial-type hearing at either the administrative or judicial level."

The construction and interpretation of a cease and desist order may be a question of law to be decided without an evidentiary hearing (Appx. A, p. A-8). But the separate issue of whether a defendant has violated the order's proscriptions, as construed, necessarily requires an evidentiary hearing when there are factual disputes. Thus, in holding that only a question of law is raised in the issue of whether

the Reader's Digest advertisements were "confusingly simulated item[s] of value" in violation of the consent order,[9] the court below improperly precluded Reader's Digest from showing that *in fact* the advertisements had no capacity or tendency to mislead consumers.[10]

The crux of the ruling below is the Court of Appeals' erroneous rationalization that treating the question of whether an advertisement violates a prior order as an issue of fact "'would usurp the function exclusively vested in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public'" (Appx. A, pp. A-12 to A-13, quoting dictum in

---

9. The Third Circuit's ruling in this regard is even more enigmatic because, in a prior opinion (*Beneficial Corp. v. F.T.C.* (3 Cir. 1976) 542 F.2d 611), the court below recognized that whether an advertisement

> "• • • has a tendency to deceive or mislead is obviously • • • more closely akin to a *finding of fact* than to a conclusion of law" (542 F.2d 617; emphasis added)

and consequently

> "• • • evidence that some customers actually misunderstood the thrust of the message is significant support for the finding of a tendency to mislead" (542 F.2d 617).

If the "fact" that consumers were deceived is significant in showing a tendency to mislead, the "fact" that they were not deceived certainly indicates the lack of such a tendency.

10. The record is devoid of evidence that anyone was actually deceived. The fact that no one was deceived by the advertisements is not surprising; they clearly stated that they were "not negotiable" or "non-negotiable" and that they were only part of advertisement packets (Appx. A, pp. A-31 to A-32).

> "We cannot assume that which is clearly expressed in plain English language on any form sent to any literate recipient in this country would *not* be read, or *not* be understood. If that were true, no notice of any kind would be sufficient. It may be difficult to make the American public heed or read a printed statement of fact, but it is there so that all who look and read may know" (*In re Floersheim* (9 Cir. 1963) 316 F.2d 423, 427).

*United States v. Vulcanized Rubber & Plastics Company* (3 Cir. 1961) 288 F.2d 257, 258-259, n. 2, certiorari denied (1961) 368 U.S. 821). The ruling below totally ignores the critical fact that *the Commission never determined whether the Reader's Digest advertisements in question violated the order.*

At no point in the proceedings did the Commission make a factual finding or determination that the Reader's Digest advertisements violated the consent order, nor did the Commission conduct an evidentiary hearing that could lead to any such finding or determination. In fact, defendant was not even informed of any claim that the packet containing pictures of "cash-convertible bonds" violated the order until the United States Attorney filed the complaint in district court (Appx. A, pp. A-3 to A-4). Although due process may not always require a prior factual hearing before the Government takes action affecting the rights of a defendant, such as initiating a civil penalty proceeding, it does require that there be a hearing at some stage of the proceedings (*Ewing v. Mytinger & Casselberry* (1950) 339 U.S. 594, 599; see also Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum. L. Rev. (1979) 1435, 1487).[11]

---

11. This case is quite different from the situation in which a defendant challenges the Commission's findings as not sufficient to support a cease and desist order. The courts defer to such underlying findings, but it is the responsibility of the courts to adjudicate subsequent violations of the order:

> "The enforcement responsibility of the courts, once a Commission order has become final either by lapse of time or by court approval, • • • is to adjudicate questions concerning the order's violation" (*Federal Trade Commission v. Morton Salt Co.* (1948) 334 U.S. 37, 54; see also Comment, The Right to a Jury Trial in FTCA Section 5(l) Civil Penalty Actions, 60 Iowa L.Rev. (1974) 378, 382).

Prior to 1975, § 16 of the FTC Act required the Commission, if it had "reason to believe" that anyone was liable to a penalty for violating a cease and desist order, to "certify the facts to the Attorney General, whose duty it shall be to cause appropriate proceedings to be brought" for civil penalties (*United States v. St. Regis Paper Company* (2 Cir. 1966) 355 F.2d 688). The decision below would have presented serious issues under this statute: a certification of "reason to believe" that a cease and desist order had been violated was only a threshold determination that a complaint should initiate proceedings; it was not a definitive ruling and had no legal force (cf. *F.T.C. v. Standard Oil Company of California* (1980) ..... U.S. ....., 101 S.Ct. 488, 493-494).[12] The issue is even more serious under the 1975 amendments to the Act which removed the requirement that the Commission certify the facts to the Attorney General (88 Stat. 2199-2200, amending § 16 of the FTC Act). Under the Act as amended, the FTC does not even certify that it has such "reason to believe"; the Commission merely asks the Attorney General to commence a civil penalty action for violation of a cease and desist order without any certification (FTC Act, § 5(l); Appx. E., pp. E-90 to E-91); if the Justice Department fails to bring the action within 45 days, then the FTC may bring

---

12. Prior to the 1975 amendments, one court observed that: "• • • the Commission has the obligation to determine and to inform parties whether and to what extent their conduct may be in violation of a cease and desist order. It is only after the Commission has made such a finding that the penalties contemplated • • • could be assessed, and only from that day forward. *Any other interpretation of the statute and regulations would raise serious questions of due process*" (*Continental Baking Company v. Dixon* (D.Del. 1968) 283 F.Supp. 285, 287-288; emphasis added).

its own action (FTC Act, § 16(a)(1); Appx. E, pp. E-92 to E-93). [13]

A defendant charged with violating an FTC order does *not* have any opportunity to have factual disputes about violation resolved and findings made until the civil penalty action in district court—and now the Third Circuit has eliminated the opportunity for a hearing at this stage as well.[14]

## II. THE RULING BELOW—THAT A PUBLISHER WHO IN SIX BULK MAILINGS DISTRIBUTES 17 MILLION COPIES OF TWO ADVERTISEMENTS WHICH ALLEGEDLY VIOLATE A CONSENT ORDER HAS COMMITTED 17 MILLION SEPARATE VIOLATIONS, EACH OF WHICH IS SUBJECT TO A PENALTY OF $10,000—IS CONTRARY TO THE INTENT OF CONGRESS IN ENACTING THE FTC ACT, AS WELL AS CASES INTERPRETING THE FTC ACT AND SIMILAR STATUTES.

The Third Circuit has held that an advertiser by using six bulk mailings to distribute nearly 17 million copies of an advertisement commits nearly 17 million separate violations, each of which is subject to a penalty of $10,000 (Appx. A, pp. A-18 to A-22). The dissenting opinion on

---

13. Congress' failure to provide for a hearing before the Commission prior to commencement of a civil penalty proceeding clearly shows that Congress did not intend the FTC's commencement of a civil penalty proceeding to be a conclusive ruling on disputed factual issues (Comment, The Right to a Jury Trial in FTCA Section 5(l) Civil Penalty Actions, 60 Iowa L.Rev. (1974) 378, 383). In the absence of any hearing prior to commencement of a civil penalty action, the decision to allege a violation of a cease and desist order is a policing or discretionary prosecutorial decision; a judicial hearing must follow (60 Iowa L.Rev. 382).

14. "Even where statutes do not unambiguously require an evidentiary hearing at some stage, due process requires that a full-scale trial-type hearing be provided before a civil penalty can be exacted" (Diver, The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies, 79 Colum.L.Rev. (1979) 1435, 1487).

denial of rehearing in banc summarized the court's substantial policy errors, which should not stand:

> "[T]he imposition of a penalty, in the context here, based on the number of individual documents (simulated travel checks and bonds) mailed to the public is inconsistent with the governing statute, which provides for a 'penalty of not more than $10,000 for each *violation*.' The sole support for the holding on this point is dicta from three district court opinions. The only court of appeals opinion which addresses the subject, *U.S.A. v. J. B. Williams*, 498 F.2d 714 (2d Cir. 1974), would appear to point in the other direction. Further, it is at least questionable that Congress would authorize a penalty of up to $10,000 for each piece of mail that is sent. If the rationale of the opinion in this case were to be applied to newspapers, for example, it could result in penalties of millions of dollars for a single press run. In the absence of clear language sanctioning a result of this kind, I would be reluctant to attribute such an intent to Congress" (Appx. B, pp. B-35 to B-36).

The FTC Act provides no support for the ruling below, for it does not state what constitutes a distinct and separate "violation." Section 5(l) of the FTC Act provides simply for "a civil penalty of not more than $10,000 for each violation * * *. Each separate violation of such an order shall be a separate offense * * *" (Appx. E, p. E-90). Here, Reader's Digest was charged with causing the dissemination of advertisements in violation of § 5(l). Nothing in § 5(l) suggests—much less requires—a ruling that where a firm violates an order by distributing an advertisement in a bulk mailing, each copy of the advertisement sent, rather than each separate business act of dissemination or distribution (each bulk mailing), constitutes a separate violation.

Moreover, the legislative history of the FTC Act indicates a limitation on the number of violations under

the Act and raises serious questions as to the Third Circuit's interpretation of the Act. In 1975, Congress enacted § 5(m)(1)(A) of the Act, permitting the Commission itself (as distinguished from the Attorney General) to seek civil penalties of not more than $10,000 "for each violation" of any FTC rule concerning unfair or deceptive acts or practices (Appx. E, p. E-91). In its report on that bill, the Senate Committee on Commerce stated that in determining the number of violations the focus "should be on the decision-making process of the person against whom the penalty is sought, the number of different decisions he made and the harm generated by those decisions" (Report of the Senate Committee on Commerce on S. 356, S.Rept. 93-151, 93d Cong., 1st Sess., p. 27 (May 14, 1973), reproduced in CCH Trade Regulation Reports, No. 73 (May 21, 1973)). In this case, Reader's Digest decided to distribute copies of the promotional packets in a total of *six* bulk mailings; the only evidence of what should constitute a violation was submitted by Reader's Digest and demonstrated that in the direct mailing industry, a bulk mailing is the unitary business event around which decisions are made; and no complaints about the advertisements were ever received. It is thus inconceivable that, as the court below held, Reader's Digest committed nearly 17 million violations.[15]

As the judges dissenting to the denial of rehearing correctly noted, *United States v. J. B. Williams Company, Inc.*

---

15. Testimony during Congressional hearings on amendments to strengthen the Act's penalty provision in 1938 also renders the ruling below suspect. At that hearing, Federal Trade Commissioner Davis read a memorandum that he and the Commission's chief counsel had co-authored, stating: "[A] misrepresentation in *one issue of a catalogue* that may deceive many customers *is but one act* • • •" (Hearings before the Committee on Interstate Commerce on S. 3744, 74th Cong., 2d Sess., p. 21 (Feb. 21, 1936); emphasis added).

(2 Cir. 1974) 498 F.2d 414 "would appear to point in the other direction" (Appx. B, p. B-36). There the Second Circuit affirmed the ruling of the district court that "it is the *dissemination* of an illegal advertisement which violates the order, *not the advertisement* itself" (*United States v. J. B. Williams Company, Inc.* (S.D.N.Y. 1973) 354 F.Supp. 521, 547 (television commercials); emphasis added; see also *Piuma v. United States* (9 Cir. 1942) 126 F.2d 601, 603 (publication of 13 newspaper advertisements constituted 13 violations, one for each publication)).

Contrary to *Williams* and *Piuma*, the Third Circuit has chosen to count the number of copies mailed to individual households. If the holding below had been applied by the Second Circuit in *Williams*, it would have meant that there were millions of violations by the advertiser, one for each recipient of the television broadcasts, and the potential penalty would have been in the hundreds of billions of dollars. If the holding below had been applied in *Piuma*, the 13 newspaper advertisements would have constituted thousands of violations, one for each newspaper copy distributed, and would have resulted in a potential penalty of hundreds of millions of dollars.

When Congress intends to make individual items separate violations or offenses, it does so. Congress, had it so intended, would have provided that each copy of an advertisement distributed in violation of an order shall constitute a separate violation.[16] Instead, Congress allowed

16. Congress has, for example, made it unlawful to stamp gold with anything conveying the impression of government certification of quality; the statute expressly provides that "[e]ach and every such stamp shall constitute a separate offense" (15 U.S.C. § 291). Similarly, 15 U.S.C. § 1233(a) makes it unlawful to alter, fail to affix, or fail to endorse a required automobile label, and provides that acts in violation, "with respect to each automobile shall constitute a separate offense."

a $10,000 penalty "for each violation" and provided that "[e]ach separate violation of such an order shall be a separate offense" (FTC Act, § 5(l); Appx. E, p. E-90). Using similar language, Congress in 35 U.S.C. § 292 has made it unlawful to imitate a patent mark and has provided a penalty "for every such offense." The courts have long held, however, that this language does not permit a separate penalty for each item unlawfully marked.

> "[W]here the marking is all done on the same day and at the same time, so that it is practically a single, continuous act, but one offense is committed and only a single penalty is recoverable, though more than one article may have been marked" (*London v. Everett H. Dunbar Corporation* (1 Cir. 1910) 179 Fed. 506, 507).

This Court, in *Bell v. United States* (1955) 349 U.S. 81, held that Congress, if it intends to assess multiple violations for multiple consequences of a single transaction, must clearly express its will. The provision of the Mann Act at issue in *Bell* provided that:

> "Whoever * * * transports in interstate * * * commerce * * * *any* woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose * * * [s]hall be fined not more than $5,000" (18 U.S.C. § 2421; emphasis added).

The dissenting justices in *Bell* thought that, in view of the terms of the statute and its Congressional purpose of protecting women, the transportation of two women in a single incident should constitute two violations (349 U.S. 84). The majority, however, held that "if Congress does not fix the punishment for a federal offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses" (349 U.S. 84). Accord-

ingly, even though more than one woman was transported by defendant Bell at one time, this Court held there was but a single offense.

The court below has created a dangerous precedent by approving the Government's attempt to transform six bulk mailings into millions of violations, each subject to a penalty of $10,000. The ruling below ignores the obvious chilling effect upon the First Amendment rights of other publishers and advertisers who have entered into consent decrees to resolve disputes with the Commission; it "sanction[s] a remedy which leaves open no path on which they can 'travel without anxiety'" (*Federated Nationwide Wholesalers Service v. F.T.C.* (2 Cir. 1968) 398 F.2d 253, 260, quoting *United States v. St. Regis Paper Company* (2 Cir. 1966) 355 F.2d 688, 697). The ruling below allows the Government to threaten publishers and advertisers with enormous penalties; its precedential effect will necessarily deter the distribution of commercial advertisements in the future. Under the ruling below, such advertisement, although constitutionally protected, can trigger penalties in the billions of dollars without any proof by the Government of deception or even the capacity to deceive, and without affording an opportunity to show that the advertising has no capacity to deceive. Thus, the ruling below, if left unreviewed, will have a devastating impact upon publishers and advertisers.

## CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

NOBLE K. GREGORY
Counsel of Record
WILLIAM I. EDLUND
CHARLES R. RAGAN
KEVIN M. FONG
*Counsel for Petitioner*

DAVID OTIS FULLER, JR.
WILLIAM S. BUSKER
*Of Counsel*

PILLSBURY, MADISON & SUTRO
*Of Counsel*

## *Appendix A*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2445

UNITED STATES OF AMERICA,
*Appellee,*

v.

READER'S DIGEST ASSOCIATION, INC.,
*Appellant.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE
D.C. Civil No. 75-0184

Argued April 21, 1981
Before: HUNTER, VAN DUSEN and SLOVITER,
*Circuit Judges*
Opinion filed August 24, 1981

Noble K. Gregory (Argued)
William I. Edlund
Charles R. Ragan
Pillsbury, Madison & Sutro
Edward F. Mannino
Karen Marek McAlinn
Dilworth, Paxon, Kalish & Levy
R. Franklin Balotti
Donald A. Bussard
Richards, Layton & Finger
*Attorneys for Appellant*

Susan J. Atkinson (Argued)
Robert B. Nicholson
Benjamin P. Schoen
Attorneys
Department of Justice
Washington, D.C.
Sanford M. Litvack
Assistant Attorney General
*Attorneys for Appellee*

## OPINION OF THE COURT

HUNTER, *Circuit Judge:*

1. This is an appeal from a final order of the United States District Court for the District of Delaware, which assessed a penalty of $1,750,000 against the Reader's Digest Association, Inc ("the Digest") for multiple violations of a Federal Trade Commission ("FTC") consent order, and also enjoined the company from further violations. We will affirm.

### I.

2. In 1970, the FTC initiated an investigation of the Digest's direct-mail solicitation campaigns. Characteristically, the solicitations involved the mass mailing of sweepstakes promising money or merchandise to a small percentage of those who returned the sweepstakes entry forms. At the conclusion of its investigation one year later, the FTC notified the Digest that it found the company's sweepstakes promotions to be unfair and deceptive, and that it intended to charge the Digest with violating section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976).[1]

3. The FTC did issue an administrative complaint on November 2, 1971, but the complaint was contained within a settlement agreement between the agency and the Digest to enter into a cease and desist order. The agreement stated that the order was entered into for settlement purposes only, and did not constitute an admission that the Digest had violated any law. The parties also agreed that the consent order would be construed in light of the administrative complaint.

---

1. 15 U.S.C. § 45(a)(1)(1976) provides that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

4. One of the allegations in the complaint stated that the Digest had represented that "[s]imulated checks, 'money' and other negotiable instruments and simulated 'New Car Certificates'" were "valuable and [could] be cashed, redeemed, or exchanged for United States currency or a new car," when in fact the documents were not valuable, and could not be cashed, redeemed, or exchanged for currency or a new car. Appendix at 27a; 30a. The complaint included an example of one of the Digest's simulated checks, which is reprinted in appendix 1 of this opinion. The corresponding provision of the consent order required the Digest to cease and desist from "[*u*]*sing or distributing simulated checks, currency, 'new car certificates;' or using or distributing any confusingly simulated item of value.*" Appendix at 38a (emphasis added).

5. In the first half of 1973, the Digest initiated a "Sweepstakes Passport" promotion. As part of the promotional pamphlet, the Digest mailed millions of "travel checks" which purported to pay a grand prize winner in the sweepstakes "one hundred dollars a month for life." A specimen check is reprinted in appendix 2 of this opinion.

6. On April 13, 1973, an FTC staff attorney informed the Digest that the travel checks were "clearly violative" of the portion of the consent order prohibiting the dissemination of simulated checks or confusingly simulated items of value. Appendix at 728a. The FTC met with the Digest's then associate general counsel, Mari Ann Blatch, on May 2, 1973, at which time the Commission's objections to the promotion were voiced. On May 7, 1973, Blatch informed the FTC that the Digest, "while not admitting that the 'travel check' in any way violates C-2075 [the consent order]," would discontinue their use after June 30, 1973.

Appendix at 763-64a. The company then proceeded to complete its mailing of the "Sweepstakes Passport" promotion, sending out over four million travel checks between May 7, and June 30, 1973.

7. In September and November, 1974, the Digest distributed approximately two million "cash-convertible bonds" as part of a new sweepstakes campaign. The Digest enclosed three different bonds in each packet, one purporting to award a grand prize winner "one hundred dollars a month for life," another for $24,000.00, and a third for "$2,000.00 a month for a year." The first of these bonds is reprinted in appendix 3 of this opinion. The FTC did not contact the Digest about the bonds at the time of the mailing.

8. On July 7, 1975, the Government filed a complaint in district court pursuant to sections 5(*1*) and 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. §§ 45(*1*) and 56(a)(1)(1976), to recover penalties for violations of the cease and desist order, and to secure injunctive relief.[2]

---

2. 15 U.S.C. § 45(*1*) (1976) provides:

> Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

The 1973 Amendment to this statute raised the maximum penalty for each violation from $5,000 to $10,000, and added the last sentence empowering the district courts to grant mandatory injunctions and further equitable relief.

*(Footnote continued)*

Appendix at 7-10a. The complaint charged that the Digest had violated the consent order by distributing several million "simulated checks," and several million "confusingly simulated items of value."

9. Following discovery, the Digest moved for summary judgment, and the Government moved for partial summary judgment on the issue of liability. On November 28, 1978, the district court granted the Government's motion for summary judgment on liability. *United States v. Reader's Digest Association, Inc.*, 464 F.Supp. 1037 (D.Del. 1978). The court held that the consent order entered into between the FTC and the Digest "was meant to apply to advertising material that is similar to the items mentioned in the complaint and, on its face, could be said to have the same capacity to mislead consumers." *Id.* at 1047. Thus, the court rejected the Digest's contention that the Government had to prove that the travel checks and cash-convertible bonds had actually deceived consumers. Chief Judge Latchum also rejected the Digest's argument that the challenged documents were commercial speech protected by the first amendment. The district court then examined the travel checks and bonds, and concluded that, in terms of their tendency to deceive consumers, they were indistinguishable from the original check giving rise to the consent order.

---

15 U.S.C. § 56(a)(1)(1976) provides:

> Except as otherwise provided in paragraph (2) or (3), if—
>
> (A) before commencing, defending, or intervening in, any civil action involving this chapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and
>
> (B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action: the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose.

10. Following further discovery, the district court held a penalty hearing in May, 1980. After considering the factors set forth by this court in *United States v. Papercraft Corporation,* 540 F.2d 131, 141 (3d Cir. 1976), the district court concluded that the Digest had been guilty of 17,940,521 violations of the consent order. In other words, the district court held that each letter distributed in the Digest's mass mailings constituted a separate violation. The court assessed a penalty of $1,750,000, and issued a permanent injunction against further violations of that portion of the consent order. *United States v. Reader's Digest Association, Inc.,* 494 F.Supp. 770 (D.Del. 1980). The district court denied the Digest's post-trial motions. This appeal followed.[3]

11. Four issues are presented in this appeal. First, did the district court err by granting the Government's motion for summary judgment on the issue of liability? Second, does the district court's finding that the travel checks and cash-convertible bonds violated the consent order impinge upon constitutionally protected commercial speech? Third, did the district court conclude correctly that each individual mailing constituted a separate violation of the consent

---

3. The Digest maintains that the district court's finding that there were 17,940,521 violations of the consent order is incorrect. It states that its amended answers to the Government's interrogatories establish that it mailed only 16,100,820 items: 15,894,278 travel checks and cash-convertible bonds in bulk mailings; and 206,542 travel checks and bonds in test mailings. After entry of judgment, the Digest, in a motion for relief from judgment, requested that the penalty be reduced to not more than $1,610,082 to reflect the accurate number of violations. The district court denied the motion. While conceding that in fact only 16,100,820 violations occurred, the court stated that this did not alter its conclusion that a penalty of $1,750,000 was "wholly proper and reasonable." The court rejected the Digest's contention that it had arrived at the penalty by simply assessing the company 10 cents per violation. *See* Appendix at 842-46a.

order, and did it abuse its discretion by imposing a penalty of $1,750,000 upon the Digest? Finally, did the district court abuse its discretion by granting an injunction against future violations of the consent order? We will examine each of these issues separately.

*A. Summary Judgment*

12. The Digest maintains that the district court erred by granting the Government's motion for summary judgment on the issue of liability. Appellant challenges the district court's construction of the order, contending that the ban on dissemination of "confusingly simulated item[s] of value" required the government to offer proof of actual confusion of consumers, not just a tendency to confuse. The Digest also claims that the question of whether the travel check and cash-convertible bonds violated the consent order was not ripe for summary adjudication because of the existence of genuine issues of material fact. Specifically, the company argues that there was a genuine dispute as to whether the travel check was a "simulated check," and whether the bonds were "confusingly simulated item[s] of value" within the prohibition of the consent order.

13. In determining whether the travel check and cash-convertible bonds violated the consent order, the district court properly engaged in a two-step inquiry: (1) construction and interpretation of the consent order itself; and, (2) whether the challenged documents fell within the order's proscription. *United States v. J. B. Williams Company, Inc.*, 498 F.2d 414, 430-31 (2nd Cir. 1974). In construing the terms of the order, the lower court observed that the language was "not a model of clarity," and did "not indicate whether or not the term 'confusingly' was

meant to impose upon the FTC the burden of proving actual confusion to establish a violation." *Reader's Digest*, 464 F.Supp. at 1045-46. The district court concluded that the resolution of ambiguities in the order depended upon the intent of the FTC and the Digest at the time that they negotiated the order.

14. The Digest asserts that ambiguities in the terms of a consent order, like those in a contract, can be resolved only at trial, not by summary adjudication. *See e.g., Landtect Corporation v. State Mutual Life Assurance Company of America*, 605 F.2d 75, 79-80 (3d Cir. 1979). While appellant recites correctly an accepted principle of contract law, it is nonetheless undisputed that construing the meaning of a consent order, even an ambiguous one, is a question of law for the court, capable of resolution in summary judgment proceedings. *Williams*, 498 F.2d at 431 ("what the order means [is] concededly a task for the court"); *United States v. Golden Fifty Pharmaceutical Co., Inc.*, 421 F. Supp. 1199, 1201-02 (N.D.Ill. 1976). *See also* Comment, *The Right to a Jury Trial in FTCA Section 5(1) Civil Penalty Actions*, 60 Iowa L.Rev. 378, 390-91 (1974) ("*Williams* affirmed the general rule that the [interpretation of the consent order] is a question of law to be decided by the court sitting without a jury."). Thus, the district court properly undertook the task of interpreting the consent order.

15. In construing the consent order, the district court scrutinized the underlying administrative complaint issued by the FTC. Although a consent order must ordinarily be interpreted by examination of only the "four corners" of the document, *United States v. Armour & Co.*, 402 U.S. 673 (1971), the complaint may be used as an aid in construction when the parties so provide. *United States v. ITT*

*Continental Baking Co.*, 420 U.S. 223, 238 (1975). The agreement containing the consent order at issue here expressly stated that the "complaint may be used in construing the terms of the order." Appendix at 34a. Accordingly, it was proper for the district court to examine the complaint in order to interpret the consent order.

16. The complaint reproduced some of the deceptive promotional materials disseminated by the Digest. Among other things, the complaint contained a simulated check that provided the sweepstakes winner with one hundred dollars a month for life (appendix 1 to this opinion), and a "New Car Certificate" for a 1970 Ford Mustang. These documents were said to be "typical and illustrative of the statements and representations" made by the Digest in its sweepstakes promotions. Appendix at 20a. The complaint then alleged that through these materials "and others of similar import and meaning not expressly set out herein," the Digest had represented directly or impliedly that "[s]imulated checks, 'money' and other negotiable instruments and simulated 'New Car Certificates' received by individuals from [the Digest] are valuable and can be cashed, redeemed, or exchanged for United States currency or for a new car." Appendix at 26-27a. The complaint concluded by asserting that these promotional practices by the Digest had "the capacity and tendency to mislead members of the purchasing public . . . and ha[d] induced many members of the public to participate in [the Digest's] 'sweepstakes,'" in violation of section 5 of the Federal Trade Commission Act. Appendix at 31a.

17. Reading the consent order against the background provided by the complaint, the district court concluded that the order intended to prevent the distribution of simulated checks, money, and new car certificates similar to those

reproduced in the complaint, and all other confusingly simulated items of value. The court concluded that "the adjective 'confusingly' was meant to modify the specific items mentioned in the first clause of the paragraph [that is, simulated checks, currency, and new car certificates], and that those items are simply examples of material generically described in the second clause as 'confusingly simulated item[s] of value.'" *Reader's Digest,* 464 F.Supp. at 1046. Thus, the trial court read the second part of the consent order's prohibition as an attempt to generalize the proscription contained in the first part.

18. The Digest, on the other hand, disputes the district court's reading of the order's prohibition of the dissemination of "confusingly simulated item[s] of value." The company maintains that the language of the consent order barred only those items which could be shown to have actually confused consumers. It argues that the order requires the Government to introduce evidence of actual confusion of consumers—evidence which was not adduced by the Government in this action.

19. We agree with the district court's reading of the consent order: the order does not require the Government to prove that the challenged material actually deceived or confused consumers. *Beneficial Corporation v. FTC,* 542 F.2d 611, 617 (3d Cir. 1976), *cert. denied,* 430 U.S. 983 (1977). A consent order must be interpreted in light of its principal purpose. *Williams,* 498 F.2d at 431. As the trial court observed, "[t]he prohibited goal in this case was the inducement of participation in sweepstakes by means of items that appeared to be valuable but in fact were not." *Reader's Digest,* 464 F.Supp. at 1047. The phrase "confusingly simulated item of value" was, as the district court held, intended to apply to promotional material that was similar to the items reproduced in the administrative com-

plaint, and on its face, could be said to have the same capacity or tendency to mislead consumers. While proof of actual confusion of consumers would be probative of a tendency to mislead, it is not required. *Beneficial Corporation,* 542 F.2d at 617; *Resort Car Rental System, Inc. v. FTC,* 518 F.2d 962, 964 (9th Cir.), *cert. denied,* 423 U.S. 827 (1975).[4] Thus, we conclude that the district court properly construed the relevant portion of the consent order.[5]

20. As we observed above, the question of whether the Digest violated the consent order is a bifurcated one. Having decided that the district court properly construed the terms of the order, we move to the second part of the inquiry—whether the travel check and cash-convertible bonds fell within the order's proscription against simulated checks and confusingly simulated items of value. The Digest asserts that this issue could not be determined on a motion for summary judgment because of the existence of disputed facts.[6] The company takes the position that whether the

---

4. *Beneficial Corporation* involved a challenge to enforcement of an original consent order. As the district court observed:

> Where, as here, the Commission issued an administrative complaint reflecting its belief that certain practices were deceptive or confusing, and than [sic] entered into a consent order which required the respondent to cease and desist from employing those, and similar practices, it is extremely unlikely that the Commission intended to subject itself to a more rigid evidentiary burden.

*Reader's Digest,* 464 F.Supp. at 1046-47.

5. The Digest also argues that the district court erred by barring discovery of FTC documents which would have revealed the Commission's understanding of the disputed portion of the consent order. We agree with the trial court's ruling that these items were not relevant to its interpretation of the order. *See United States v. Beatrice Foods Co.,* 493 F.2d 1259, 1264 (8th Cir. 1974), *cert. denied,* 420 U.S. 961 (1975).

6. It is curious that the Digest makes this argument after having itself moved for summary judgment on the question of liability.

travel check was a "simulated check," and whether the cash-convertible bonds were "confusingly simulated item[s] of value," are factual questions which, when disputed, can be resolved only after plenary review. The district court, on the other hand, determined these were questions for the court, capable of resolution in summary proceedings. For the reasons articulated below, we concur in the conclusion reached by the district court.

21. In *United States v. Hindman,* 179 F.Supp. 926 (D.N.J. 1960), the district court held that the question of whether a defendant in a civil penalty action under section 5 of the Federal Trade Commission Act had violated the terms of a previous consent order presented triable issues of fact that could be resolved only by jury trial. This case was later criticized, however, by our court in *United States v. Vulcanized Rubber & Plastics Company,* 288 F.2d 257 (3d Cir.), *cert. denied,* 368 U.S. 821 (1961). *Vulcanized Rubber* involved an appeal from a summary judgment in favor of the United States, awarding $6,000 under section 5(*1*) for violation of a FTC cease and desist order. We affirmed, noting that "[s]ince there was no issue of fact presented, the district court properly disposed of the case on summary judgment." *Id.* at 257-58 n.2. The opinion then went on to reject the holding of the *Hindman* court:

> The holding was erroneous, since the sole issue before the court was whether or not the labeling practice was within the proscription of the order and not whether the labeling practice was deceptive . . . [m]oreover, creating an issue of fact as the court did in Hindman, would usurp the function exclusively vested in the Federal Trade Commission to determine the issue

> of whether a labeling practice is misleading or deceptive to the public.

*Id.*[7]

22. Thus, *Vulcanized Rubber* stands for the proposition that in a section 5(*l*) suit for the recovery of civil penalties, the question of whether a challenged practice lies within the prohibition of a previous consent order is a question of law capable of resolution by the court on a motion for summary judgment. The Digest, however, relies on the Second Circuit's decision in *Williams*, which rejected this court's *Vulcanized Rubber* decision, and concluded that the question of whether advertisements violated an FTC order presented triable issues of fact to be decided by a jury.[8] With all due respect to the Second Circuit's thorough opinion, we will continue to adhere to our holding in *Vulcanized Rubber*, and treat the question of whether a consent order has been violated as a question of law to be decided by the court.

23. Our affirmation of *Vulcanized Rubber* is based, in part, upon our rejection of the assertion in *Williams* that the question of whether a consent order has been violated is the type of question that has been traditionally decided by juries. *See* 498 F.2d at 421-30. As Judge Oakes observed,

> with only one exception, and that a case subsequently subjected to severe criticism by its own circuit court of appeals [*Hindman*], no case among the many cited

---

7. Although the *Vulcanized Rubber* footnote is usually referred to as dictum, *see e.g.*, *Williams*, 498 F.2d at 422, as Judge Oakes has observed, the district court's award of summary judgment in favor of the Government in *Vulcanized Rubber* was affirmed even though the company characterized the dispute as factual rather than legal. *See Williams*, 498 F.2d at 450-51 (Oakes, J., dissenting).

8. The *Williams* decision is noted and critized in 88 Harv. L. Rev. 1035 (1975), and 53 Tex. L. Rev. 387 (1975). *See also* Note, *Deceptive Advertising, FTC Fact Finding and the Seventh Amendment*, 43 Fordham L. Rev. 606 (1975).

> in part III of the majority opinion holds that, in an action brought by the United States to recover civil penalties for violation of the valid order of *an administrative agency*, the defendant had a right to a jury trial as a matter of statutory or constitutional law.

*Id.* at 440 (emphasis original). Subsequent cases have not been to the contrary.[9]

24. Moreover, we believe that our position in *Vulcanized Rubber* is consistent with the overall purpose and structure of the Federal Trade Commission Act—fair and effective regulation of false and deceptive advertising. See *Williams*, 498 F.2d at 441-45 (Oakes, J., dissenting). The interposition of the jury in section 5(*l*) proceedings would cause unwarranted delays in the enforcement of FTC consent orders. "It is most difficult to see appellants' claim for plenary or jury trial as anything more than 'the tactics of delay and procrastination.'" *Id.* at 452 n.27 (citation omitted). The availability of a jury might well embolden companies to disseminate materials close to the borderline of an order's proscription because of a perceived increase in its odds of prevailing at trial. It would also deter the FTC from vigorous enforcement of its orders. *Cf.* 88 Harv. L. Rev. 1035, 1040 (1975).[10] Finally, it would be difficult to prevent the jury from deciding *de novo* the underlying

---

9. Indeed, in a recent action in the Second Circuit for penalties under section 5(*l*) of the Federal Trade Commission Act, the district court decided on summary judgment the question of whether the defendant had violated a negotiated consent order. United States v. Olin Ski Co., Inc., 503 F. Supp. 141 (S.D.N.Y. 1980). *See also* United States v. Bestline Products Corp., 412 F. Supp. 754 (N.D. Cal. 1976). *But see* United States v. Golden Fifty Pharmaceutical Co., Inc., 421 F. Supp. 1199 (N.D. Ill. 1976).

10. *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising*, 90 Harv. L. Rev. 661, 692-93 (1977) (emphasizing the limited resources available to FTC for the investigation of deceptive advertising practices).

question of deceptiveness, rather than comparing the challenged practice with the consent order's prohibition. *Williams,* 498 F.2d at 440-41 n.4 (Oakes, J., dissenting).[11]

25. We hold, therefore, as the district court did below, that the question of whether the travel check and cash-convertible bond violated the terms of the consent order was a question of law capable of decision on a motion for summary judgment. We must now decide whether the district court determined correctly that both of these items fell within the order's proscription.

26. The challenged travel check is reprinted in appendix 2 of this opinion. The district court held that in order to be a confusingly simulated item of value violative of the order, the travel check must have had "a capacity to confuse or mislead consumers comparable to that of the 'check' included in the administrative complaint [reprinted in appendix 1 of this opinion]." *Reader's Digest,* 464 F.Supp at 1053. We believe that this standard is consistent with the consent order's principal purpose of preventing the Digest from inducing consumers to participate in sweepstakes by means of items that appear to be valuable, but in fact are not. The court then compared the travel check to the original check, and concluded that: "[s]everal striking similarities between the Travel Check and the original check make the conclusion that the former is confusingly simulated almost inescapable." *Id.* Our examination of the travel check compels the same conclusion: the travel check is the type of document that falls clearly within the order's pro-

11. Presumably, this was the concern expressed by the *Vulcanized Rubber* court when it stated that "creating an issue of fact as the court did in *Hindman,* would usurp the function exclusively vested by Congress in the Federal Trade Commission to determine the issue of whether a labeling practice is misleading or deceptive to the public." *Vulcanized Rubber,* 288 F.2d at 258-59 n.2.

hibition. It is the type of document that appears to be valuable but in fact is not.[12]

27. The cash-convertible bond is reprinted in appendix 3 of this opinion. Engaging in the same analysis with respect to the bond as it did with the travel check, the district court found it also to be a confusingly simulated item of value. Once again, our examination of the document compels the same conclusion. The consent order barred the Digest from disseminating items which appeared to be valuable, but were not. The bond falls within this prohibition, and accordingly, the district court's finding of liability will be affirmed.

*B. Commercial Speech*

28. The Digest next contends that the district court's construction of the consent order as not requiring evidence of actual deception violated its constitutional right to advertise. Appellant's argument is based upon a line of recent Supreme Court cases extending the protection of the first amendment to commercial speech.[13] But while it is now

---

12. The Digest argues that the district court erred by holding that the company's efforts to conform the travel check to the requirements of the consent order were irrelevant. But as the Supreme Court stated in FTC v. Colgate-Palmolive Co., 380 U.S. 374, 393 (1965):

> If respondents . . . attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem 'unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.' Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 340.

13. *See, e.g.*, Friedman v. Rogers, 440 U.S. 1 (1979); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978); Bates v. State Bar of Arizona, 433 U.S. 350 (1977); Linmark Associates, Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

established beyond dispute that commercial speech comes within the protection of the first amendment,[14] it is equally clear that commercial speech is subject to "modes of regulation that might be impermissible in the realm of non-commercial expression." *Ohralik v. Ohio State Bar Association*, 436 U.S. 447, 456 (1978). The Government "does not lose its power to regulate commercial activity deemed harmful to the public wherever speech is a component of that activity." *Id.* Thus, in evaluating the consent order at issue here, the district court undertook "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Reader's Digest*, 464 F.Supp. at 1051, *quoting*, *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975). Striking this balance, the court concluded that the consent order "passe[d] constitutional muster without a requirement of proof of deception." *Reader's Digest*, 464 F.Supp. at 1052. We agree.

29. As the Second Circuit recently noted in *Jay Norris, Inc. v. FTC*, 598 F.2d 1244, 1252 (2nd Cir.), *cert. denied*, 444 U.S. 980 (1980), "[t]he FTC is charged by Congress with the duty of protecting consumers from the deceptive and misleading use of commercial speech or advertising." Commensurate with this duty is the power to fashion broad remedial relief to prevent a company engaging in deceptive practices from engaging in similarly deceptive practices in the future. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 392 (1959); *National Commission on Egg Nutrition v. FTC*, 570 F.2d 157, 164 (7th Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). Any remedy formulated by the FTC that is *reasonably necessary* to the prevention of future violations does

---

14. *See generally*, Comment, *First Amendment Protection for Commercial Advertising: the New Constitutional Doctrine*, 44 U. Chi. L. Rev. 205 (1976).

not impinge upon constitutionally protected commercial speech. *Jay Norris,* 598 F.2d at 1252; *Beneficial Corporation,* 542 F.2d at 619. *See also* Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?,* 61 Minn. L. Rev. 705, 718 (1977) (arguing that the inclusion of commercial speech within the first amendment does not mean that the FTC "can no longer shape remedial relief to 'fence in' violators and proscribe deception and unfairness in all its various forms."); *Pitofsky, supra* note 10, at 671-73 (asserting that first amendment will not serve as shield against FTC enforcement actions for deceptive advertising).

30. Within this framework for analysis, it is apparent that the district court properly concluded that the consent order did not require evidence of actual deception. As the court observed, "[g]iven the incontestable premise that the simulated check included in the administrative complaint is deceptive, the Government's presumption that all similarly situated items of value probably will be deceptive is not unreasonable." *Reader's Digest,* 464 F. Supp. at 1052. The effectiveness of the FTC's efforts to prevent the dissemination of confusingly simulated items of value would be "substantially diminished" if it were required to prove actual deception. *See Ohralik,* 436 U.S. at 466. These governmental interests do, as the district court found, substantially outweigh the value of the affected commercial speech. *Reader's Digest,* 464 F. Supp. at 1052. Accordingly, we hold that there has been no violation of the Digest's first amendment rights.

### *C. The Penalty*

31. The Digest challenges the district court's assessment of a $1,750,000 penalty for its violation of the consent

order. The company's first assertion is that the trial court erroneously determined the number of violations of the order. It argues that each bulk mailing, and not, as the district court concluded, "each individual distribution of a Travel Check or Cash Convertible Bond," constituted a separate violation of the order. *Reader's Digest,* 494 F. Supp. at 774. The Digest also maintains that the district court's calculation of the $1,750,000 penalty was based upon an improper analysis of the factors set forth by this court. *Papercraft,* 540 F.2d at 141. For the reasons given below, we disagree.

32. In determining the number of violations of the consent order, we must examine the applicable provisions of the statute, and the order itself. The statute, 15 U.S.C. § 45(*l*) (1976) provides, in pertinent part, that a violator of a FTC cease and desist order "shall forfeit and pay to the United States a civil penalty of not more than $10,000 for *each* violation." (emphasis added). The statute further provides that "[e]ach separate violation of such an order shall be a separate offense." *Id.* Turning to the applicable terms of the consent order, the Digest was prohibited from "[u]sing or distributing simulated checks, currency, 'new car certificates;' or using or distributing *any* confusingly simulated item of value." Appendix at 38a (emphasis added). Juxtaposing the language of the statute and the order, we reach the same conclusion as the district court —the distribution of *any* simulated item of value comprised a separate violation of the order. Thus, each mailing of an individual travel check or cash convertible bond constituted a distinct violation of the consent order, punishable by a penalty not to exceed $10,000.

33. The question of whether bulk mailings constitute single or multiple violations of a consent order is one of

first impression for a circuit court. We nonetheless find strong support for our holding in several district court decisions. In *United States v. Floersheim*, [1980-2] CCH Trade Cases ¶ 63,368 (C.D. Cal. 1980), *aff'd*, No. 80-5444 (9th Cir. July 23, 1981) the Government sought civil penalties for violations of a consent order prohibiting the sale of misleading and deceptive business forms. The court found that sale of approximately 300,000 copies of the forms constituted 300,000 violations of the order because "[e]ach individual form sold constituted a separate violation of the order and is therefore a separate offense subject to penalties." *Id.*

34. In *Golden Fifty Pharmaceutical Co.*, the Government sought penalties for fourteen mass mailings and two individual mailings which, defendants admitted, violated a FTC consent order. The district court concluded that not only had there been sixteen violations, but that each individual mailing could have been construed to have been a separate violation of the order prohibiting the company from mailing "*any advertisement* which contain[ed] a proscribed representation." 421 F. Supp. at 1207 (emphasis original). The court reasoned that "[i]f defendant had mailed a single advertisement in Court I, we would have little trouble finding a violation. The fact that they mailed millions, rather than one or two, as in Court III, does not diminish the seriousness of each individual violation." *Id.* *See also Williams*, 354 F. Supp. 521, 547-48 (S.D.N.Y. 1973), *aff'd in part and rev'd in part*, 498 F.2d 414 (2d Cir. 1974) (broadcast of eleven offending commercials on 100 separate television programs held to constitute 100 violations of the order); *United States v. Wilson Chemical Company, Inc.*, 1962 CCH Trade Cases ¶70,478 (W.D. Pa. 1962), *aff'd*, 319 F.2d 133 (3d Cir. 1963) (offending adver-

tisement appeared in 25,000,000 comic books; although government grouped the violations into nine categories depending upon publisher and date of publication, "in reality each comic book published and mailed which reaches the hands of a recipient is a violation of the Order.")

35. Our holding that each letter included as part of a mass mailing constitutes a separate violation is also predicated upon our belief that it is consistent with the legislative purpose underlying the penalty provision of the statute. 15 U.S.C. § 45(*l*) (1976). As the Supreme Court held in *ITT Continental Baking*, "Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than an acceptable cost of violation, rather than as a deterrence to violation." 420 U.S. at 231.[15] *See also Brown & Williamson Tobacco Corp. v. Engman*, 527 U.S. 1115, 1120 (2d Cir. 1975), *cert. denied*, 426 U.S. 911 (1976). Adopting the Digest's position that one bulk mailing—no matter how large—comprises only one violation would eviscerate any punitive or deterrent effect of FTC penalty proceedings.[16]

---

15. Although *ITT Continental Baking* dealt with the continuing violation provision of 15 U.S.C. § 45(*l*) (1976), we believe that the Court's holding applies with equal force to a civil penalty action for separate violations under the statute. We find nothing to the contrary in the legislative history cited by the Digest.

16. *Cf.* Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435, 1458 (1979): "[t]he efficacy of any regulatory program depends on the sanctions imposed in individual cases. If these sanctions are set too low, potential violators may be insufficiently motivated to minimize the social harm resulting from their behavior, or society may be under compensated for the harm that does occur."

36. We also reject the Digest's contention that "logic" dictates that it could not have committed so many violations as to have exposed it to a potential penalty amounting to billions of dollars. Although our holding with respect to the number of violations does give rise to the possibility of enormous potential liability, any penalty actually imposed by a district court would be subject to the limitation of judicial discretion. *Brown & Williamson,* 527 F.2d at 1121; *ITT Continental Baking,* 420 U.S. at 229 n.6.[17] Indeed, while we do not trivialize the gravity of a $1,750,000 penalty, it is apparent that the district court exercised its discretion in the instant case. Whether or not the court abused its discretion is the question that we turn to next.

37. In determining the size of the penalty to be assessed against the Digest, the district court, relying on our *Papercraft* decision,[18] took five factors into consideration: (1) the good or bad faith of the defendants; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the FTC.

---

17. As the Second Circuit observed in *Brown & Williamson,* the legislative history of the 1950 Amendment to 15 U.S.C. § 45(*l*) contemplated the exercise of judicial discretion in meting out penalties for violations of consent orders:

> [I]t is inconceivable to me that any Federal court would impose penalties under this section which are not reasonably related both to the seriousness of the offense charged and the size and resources of the defendant.
>
> 96 Cong. Rec. 2974, 3026 (1950) (letter from W.T. Kelley, General Counsel, FTC, to Senator Fulbright).
>
> In no event would the court sanction any unreasonable penalty, or any such total penalty as would be destructive of legitimate business. So, therefore, I do not think there is any real danger here to legitimate business.
>
> 96 Cong. Rec. 3019 (1950) (remarks of Senator George).

527 F.2d at 1121 n.8.

18. *Papercraft,* in turn, drew upon Judge Friendly's analysis in *Williams. See* 498 F.2d at 438-39.

*Reader's Digest,* 494 F. Supp. at 772. The Digest does not challenge the district court's reliance on these factors; rather, it asserts that the court evaluated three of the factors improperly: good faith; public injury; and benefits derived by a violation. We will review each of these contentions below.

38. The record clearly supports the district court's conclusion that the Digest did not act in good faith when it disseminated the travel checks and cash-convertible bonds. Although the FTC informed the Digest as early as April 13, 1973, that it considered the travel checks to be violative of the consent order, the Digest nonetheless proceeded to complete its promotional campaign by mailing millions of additional travel checks between April 13, and June 30, 1973. *See* Appendix at 728-29a; 627-29a. The Digest now maintains that these additional mailings simply reflected the lag time required by the logistics of bulk mailing. We reject this argument, and agree with the district court's conclusion that the course of conduct engaged in by the Digest between April 13, and June 30, 1973 "[did] not reflect a good faith effort to comply with the order." *Reader's Digest,* 494 F. Supp. at 775.[19]

---

19. The Digest maintains that after its meeting on May 2, 1973 with the FTC, it believed that discontinuance of the travel check campaign by June 30, 1973 would satisfy the Commission's concerns. However, the cross-examination of Mari Ann Blatch, the Digest's then associate general counsel, revealed that the FTC never implicitly or explicitly approved the continued mailing of the travel checks after May 2, 1973:

> Q: Did any member of the FTC, Mr. Ryder or Mr. Sanger or anyone else, ever approve or authorize the continued mailing of the travel check at the May 2 meeting or at any time thereafter?
>
> A: No, and I didn't ask them to because I had said we would discontinue, which we did. On any number of occasions after that I did ask how we were doing, did they have any other suggestions, were there any other matters still open or any

39. Further evidence of bad faith is supplied by the Digest's failure to avail itself of the mechanism for obtaining an opinion from the FTC prior to distributing the travel checks and cash-convertible bonds. The applicable FTC rule in 1973 provided, in pertinent part: "[a]ny respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order." 16 C.F.R. § 3.61(d)(1973). This provision has been interpreted by the Supreme Court as obligating the FTC to "give . . . definitive advice as to whether [a] proposed action, if pursued, would constitute compliance with the order." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965).[20] That the Digest neglected to

---

reason why we weren't receiving our report, and that is why I received for example, the letter saying "No cause for concern."

Q: I appreciate your elaboration, but in fact there was never any letter communication, written communication, oral communication, authorizing the continued use of the travel check?

A: No.

Appendix at 625-26a.

20. The Digest argues that *Colgate-Palmolive* is inapposite because the regulation construed by the Court in that case was subsequently amended to provide, as it did in 1973, that "[a] request ordinarily will be considered inappropriate for such advice . . . (2) where the same or substantially the same course of action is under investigation or is or has been the subject of current proceedings, order, or decree initiated or obtained by the Commission or another governmental agency." 16 C.F.R. § 3.61(d) (1973). The Digest appears to be contending that this amendment of the FTC rules relieved it from the duty of seeking advice from the Commission prior to distributing the travel checks and cash-convertible bonds. But, in fact, the Digest cannot be arguing this, because it would be tantamount to admitting that these promotional campaigns constituted "the same or substantially the same course of action [that] has been the subject of a current . . . order." *Id.* Moreover, the Digest's construction of § 3.61(d) would render it meaningless. Thus, the Digest should have requested a prior opinion from the FTC.

The FTC rule is currently codified as 16 C.F.R. § 2.41(d) (1980).

seek an opinion from the FTC is particularly surprising in light of its awareness that the consent order called for "careful scrutiny of any 'bonds,' 'traveler's checks' or other copies of negotiable instruments." Appendix at 751a (memorandum to the Digest's employees from Blatch concerning the scope of the consent order). We also find, contrary to the Digest's assertions, that its procedure for clearing all promotional copy with in-house counsel does not prove good faith in view of its failure to utilize the appropriate administrative mechanism for obtaining FTC advice.

40. Finally, with respect to its good faith argument, the Digest contends that the district court committed prejudicial error by admitting into evidence a promotional packet mailed to a Miss Megan R. Golden in 1979, which apparently could be considered to be a confusingly simulated item of value. *See Reader's Digest,* 494 F. Supp. at 777. While we are inclined to agree with the Digest that this document was of little probative value to a determination of the company's good faith in disseminating travel checks and cash-convertible bonds in 1973-74, we nonetheless do not find any prejudice arising from its consideration by the district court. The trial court found the mailing to be only one indicia of the Digest's lack of good faith; there is abundant additional evidence to support its conclusion.

41. Turning to the second factor at issue, public injury, the Digest asserts that the record is devoid of evidence of consumer confusion or deception. But this argument fails for the same reason that it did with respect to the construction of the consent order—proof of actual confusion or deception is not required. *See* pp. 12-13 *supra.* As the district court observed, "[t]he principal purpose of a cease

and desist order is to prevent material having a capacity to confuse or deceive from reaching the public . . . [t]hus, whenever such promotional items reach the public, that *in and of itself* causes harm and injury." *Reader's Digest*, 464 F. Supp. at 777-78 (emphasis original). The trial court had already determined that the travel check and cash-convertible bond possessed the capacity to deceive; accordingly, the Government was not obligated to adduce evidence of specific injuries to consumers.

42. Finally, with respect to the benefits derived by the violation, the district court concluded that the Digest received "substantial benefits from the violative distributions." *Id.* at 778. We find ample support for the court's conclusion. The district court found that the Digest obtained more than $5,000,000 in gross subscription revenues from the travel check and cash-convertible bond promotions. The travel check campaign ranked among the top three of all the company's promotions. Thus, the district court properly rejected the Digest's contention that it received no particular benefit from the violative mailings.

43. In sum, we conclude that the district court carefully considered the relevant factors prior to assessing the $1,750,000 penalty upon the Digest. We hold that there was no abuse of discretion by the district court.

*D. The Injunction*

44. In addition to assessing a monetary penalty upon the Digest, the district court entered an injunction which stated:

> Defendant Reader's Digest Association, Inc., its officers, directors, servants, employees, agents, representatives, assigns, and all persons in active concert or participation with defendant, who shall have received actual notice of the contents of this Final Judg-

> ment and Permanent Injunction, by personal service or otherwise, directly or through any corporate or other device, are hereby permanently enjoined in connection with the publication, advertising, offering for sale, sale, or distribution of magazines, books, or other products in commerce as 'commerce' is defined in the Federal Trade Commission Act from: '[u]sing or distributing simulated checks, currency, "new car certificates"; or using or distributing any confusingly simulated item of value.'

Appendix at 826a.

The Digest asserts that: the injunction is impermissibly vague; the district court did not set forth the reasons for its issuance; the injunction is unsupported by evidence in the record; and, the injunction purports to restrict the conduct of persons beyond the jurisdiction of the court. We find these contentions to be without merit.

45. The form and scope of injunctions is mandated by Fed. R. Civ. P. 65(d) which provides, in part, that an injunctive order "shall be specific in terms; [and] shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts to be restrained." These prerequisites to the issuance of an injunction "are designed to protect those who are enjoined by informing them of what they are called upon to do or refrain from doing in order to comply with the injunction." 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2955 at 536 (1973). The Digest can hardly argue that, after the termination of this litigation, it will not be on notice as to what type of activity is proscribed by the injunction. The district court, and now this court, have both construed the portion of the consent order included within the injunction. The injunction may be broad, but it is not

vague;[21] it states with sufficient specificity what practices are prohibited.[22]

46. Rule 65(d) also provides that an injunction "shall set forth the reasons for its issuance." This provision refers to the order or opinion granting the relief, and the reasons need not be set forth within the injunction itself. *Hunter v. United States,* 388 F.2d 148, 155 n.6 (9th Cir. 1967). The district court stated that it decided to grant the injunctive relief because it was "convinced that this additional remedy should be afforded the Government in order to further assure that Reader's Digest will abide by the provisions of the order to which it agreed in 1971." *Reader's Digest,* 494 F. Supp. at 779. This statement, when read in the context of the court's entire opinion detailing the Digest's lack of good faith in prior compliance with the consent order, provides a sufficient reason for the issuance of the injunction. *Cf. United States v. Rohm & Haas Company,* 500 F.2d 167, 177 (5th Cir. 1974), *cert. denied,* 420 U.S. 962 (1975).

47. We also conclude that the district court's opinion provides sufficient findings to support its decision to afford injunctive relief. The court's opinion reveals that it grounded its decision to grant the injunction upon its

---

21. "Broadness refers to the range of the defendant's activity brought within the purview of the decree; vagueness refers to the particularity with which this range of activity is described." *Developments in the Law—Injunctions,* 78 Harv. L. Rev. 994, 1064 (1965). *See also* Jaffe, *The Judicial Enforcement of Administrative Orders,* 76 Harv. L. Rev. 865, 885-86 (1963).

22. This is not a case, like United States v. Vitasafe Corp., 345 F.2d 864, 871 (3d Cir.) *cert. denied,* 382 U.S. 918 (1965), in which the defendant is placed " 'at the peril of a summons for contempt' without providing any guidelines for the carrying on of a future advertising program in a manner deemed appropriate by the District Court." Not only is the injunction at issue in the instant case sufficiently specific, but the Digest may also resort to the FTC's administrative procedure for obtaining advisory opinions prior to embarking upon future advertising campaigns. *See* pp. 28-29 & note 20 *supra.*

determination that the Digest acted in bad faith. There is ample evidence in the record to support the court's conclusion that the Digest cannot be reasonably expected to comply with the consent order in the future without a judicially imposed prohibition.

48. Finally, we reject the Digest's contention that the injunction purports to be binding upon persons beyond the Court's jurisdiction. The language of the order, enjoining the Digest and its "officers, directors, servants, employees, agents, representatives, [and] assigns" who have notice, merely tracks the language provided by Rule 65(d).[23] *See* 11 C. Wright & A. Miller, *Federal Practice and Procedure*, § 2956 at 566-68 (1973). Accordingly, we hold that the district court did not abuse its discretion by granting the Government's request for injunctive relief.

## III

49. In conclusion, we hold that the district court properly granted the Government's motion for summary judgment on the issue of liability. The district court's finding that the travel checks and cash-convertible bonds violated the consent order did not impinge upon the Digest's constitutionally protected commercial speech. We find that the district court concluded correctly that each individual mailing constituted a separate violation of the consent order, and that the court did not abuse its discretion by assessing a penalty of $1,750,000 upon the Digest. Finally, we hold that the district court did not abuse its discretion by enjoining the Digest from future violations of the consent order.

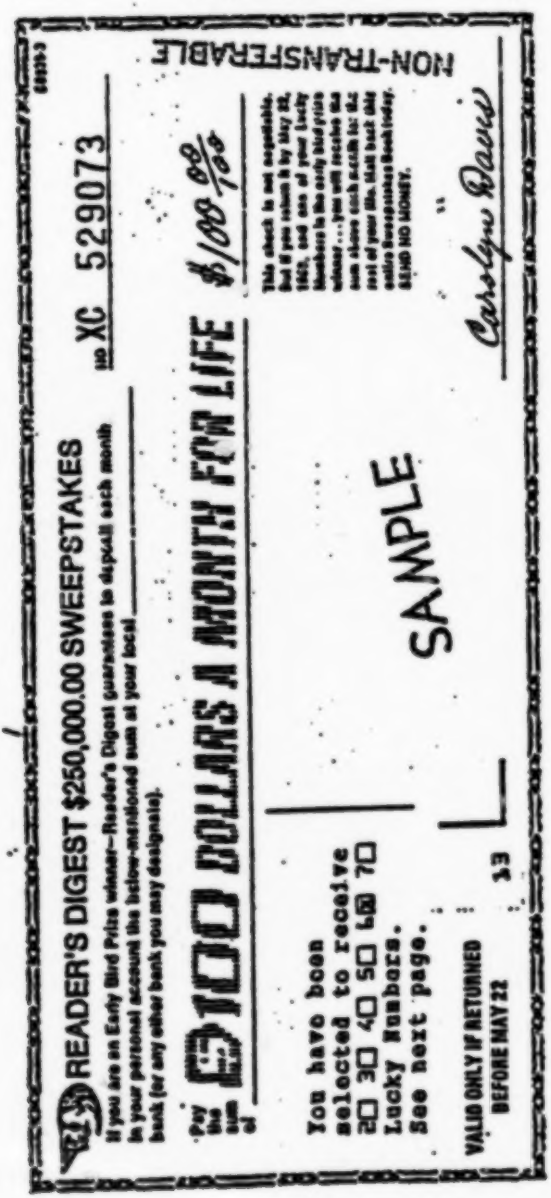
50. Therefore, the judgment of the district court will be affirmed.

---

23. Fed. R. Civ. P. 65(d) provides, in relevant part, that "[e]very order granting an injunction . . . is binding upon the parties to the action, their officers, agents, servants, employees, and attorneys . . . who receive actual notice."

United States of America v. Reader's Digest Association, Inc., No. 80-2445.

## APPENDIX 1



United States of America v. Reader's Digest Association, Inc., No. 80-2445.

## APPENDIX 2

READER'S DIGEST

# "TRAVEL CHECK"

## » 100 DOLLARS A MONTH FOR LIFE «

YOUR SWEEPSTAKES NUMBERS

A 109 021
B 210 032
C 311 144

M1071-11

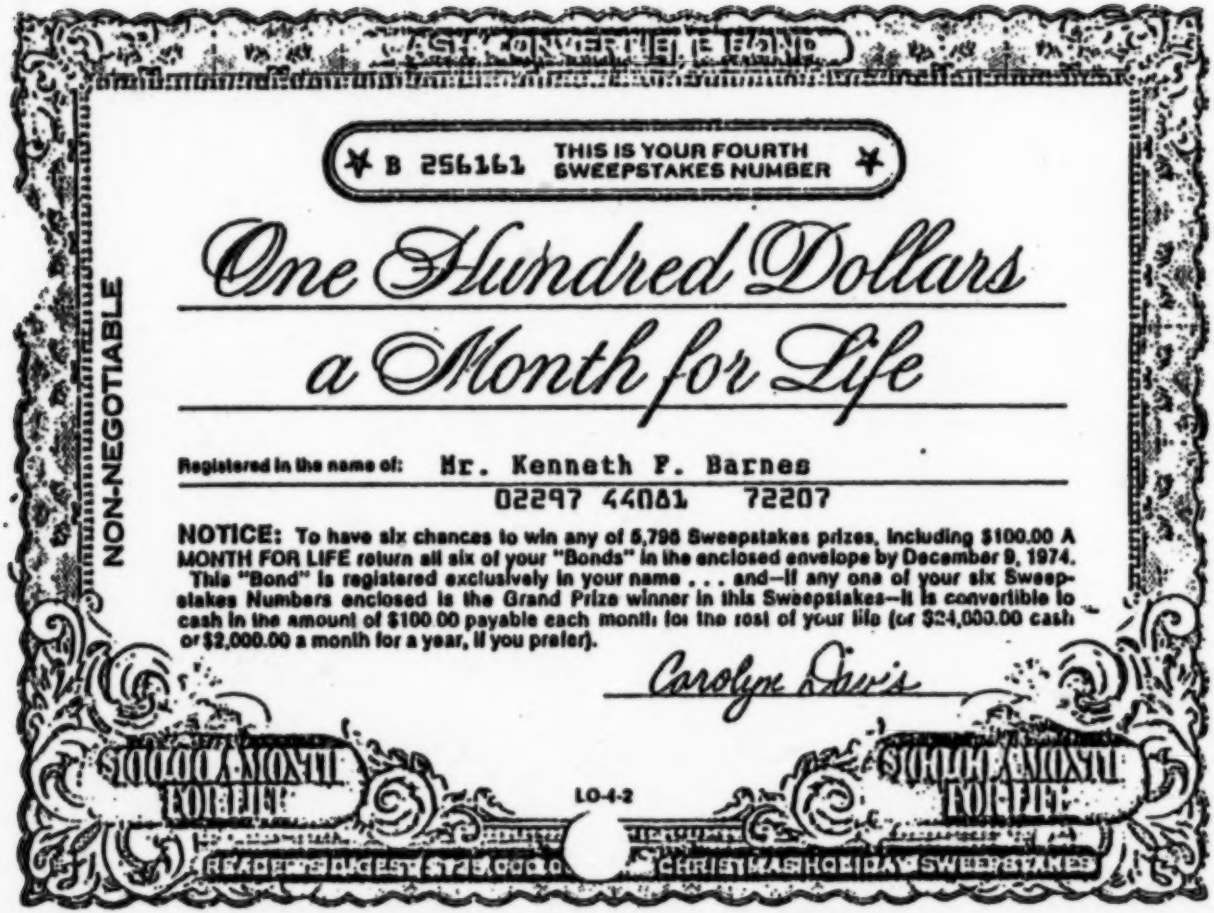
WILL BE PAID TO THE ORDER OF:

Mr. George R. Surrette
62 Wanel Dr.
Glastonbury, Conn. 06033

This "Travel Check" is not negotiable, but if you return this entire "Sweepstakes PASSPORT" by August 3, 1973, and if any one of your six numbers should be the Grand Prize winner . . you will receive the sum above each month for the rest of your life.

$150,000,000 WEEPSTAKES

**APPENDIX 3**


ASK TO CONVERT THIS BOND
B 256161 THIS IS YOUR FOURTH SWEEPSTAKES NUMBER
One Hundred Dollars a Month for Life
NON-NEGOTIABLE
Registered in the name of: Mr. Kenneth P. Barnes
02297 44081 72207
NOTICE: To have six chances to win any of 5,796 Sweepstakes prizes, including $100.00 A MONTH FOR LIFE return all six of your "Bonds" in the enclosed envelope by December 9, 1974.
This "Bond" is registered exclusively in your name . . . and—if any one of your six Sweepstakes Numbers enclosed is the Grand Prize winner in this Sweepstakes—it is convertible to cash in the amount of $100.00 payable each month for the rest of your life (or $24,000.00 cash or $2,000.00 a month for a year, if you prefer).
Carolyn Davis
$100.00 A MONTH FOR LIFE
LO-4-2
$100.00 A MONTH FOR LIFE
READER'S DIGEST $75,000.00 CHRISTMAS HOLIDAY SWEEPSTAKES

SLOVITER, *Circuit Judge,* Concurring.

I agree with the majority's disposition of this case and almost all of its comprehensive opinion. I write separately only because I believe that the discussion of the division between judge and jury in paragraphs 22 through 25 (typescript op. at pp. 15-18) goes further than necessary under the facts of this case. The case before us is one in which the issues were clearly appropriate for disposition by the trial court, because Reader's Digest did not request a jury trial. However one characterizes the issue of whether Reader's Digest's conduct was proscribed by the prior consent order, it is clear that in this case, it was the trial court which would have been required to make that decision. Therefore the only question before us on that issue is whether summary judgment was appropriate. Because the relevant facts were not in dispute, I agree with the majority that summary judgment was appropriate.

I would leave for another day the issue whether the dictum in the footnote in *United States v. Vulcanized Rubber & Plastics Co.,* 288 F.2d 257, 258 n.2 (3d Cir.), *cert. denied,* 368 U.S. 821 (1961), precludes a jury trial in all instances on a respondent's claim that its actions were not proscribed by a prior order.

A True Copy:

Teste:

*Clerk of the United States Court of Appeals for the Third Circuit*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2445

UNITED STATES OF AMERICA

vs.

READER'S DIGEST ASSOCIATION, INC.,

*Appellant*

(D. C. Civil No. 75-0184)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE

Present: Hunter, Van Dusen and Sloviter, *Circuit Judges*

**JUDGMENT**

This cause came on to be heard on the record from the United States District Court for the District of Delaware and was argued by counsel on April 21, 1981.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, entered July 21, 1980 and August 15, 1980, be, and the same is hereby affirmed. Costs taxed against appellant.

ATTEST:
Sally Mrvos
Clerk

August 24, 1981

## *Appendix B*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2445

UNITED STATES OF AMERICA
*Appellee*

v.

READER'S DIGEST ASSOCIATION, INC.,
*Appellant*

---

**SUR PETITION FOR REHEARING**

---

Present: Seitz, *Chief Judge,* Van Dusen, Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, and Sloviter
*Circuit Judges*

---

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

Judges Aldisert, Adams and Weis would grant the petition for rehearing in banc.

**STATEMENT BY JUDGE ADAMS**

Judge Adams votes for rehearing because he believes the imposition of a penalty, in the context here, based on the

number of individual documents (simulated travel checks and bonds) mailed to the public is inconsistent with the governing statute, which provides for a "penalty of not more than $10,000 for each *violation.*" The sole support for the holding on this point is dicta from three district court opinions. The only court of appeals opinion which addresses the subject, *U.S.A. v. J.B. Williams,* 498 F.2d 714 (2d Cir. 1974), would appear to point in the other direction. Further, it is at least questionable that Congress would authorize a penalty of up to $10,000 for each piece of mail that is sent. If the rationale of the opinion in this case were to be applied to newspapers, for example, it could result in penalties of millions of dollars for a single press run. In the absence of clear language sanctioning a result of this kind, I would be reluctant to attribute such an intent to Congress.

Judges Aldisert and Weis join Judge Adams' statement.

By the Court,
/s/ James Hunter, III
James Hunter, III, *Circuit Judge*

Dated: September 16, 1981

## *Appendix C*

UNITED STATES OF AMERICA,
*Plaintiff*,

v.

READER'S DIGEST ASSOCIATION, INC.,
*Defendant*.

Civ. A. No. 75-184.

United States District Court,
D. Delaware.

Nov. 28, 1978.
As Amended March 20, 1979.

### OPINION

LATCHUM, Chief Judge.

This is an action brought by the United States of America (the "Government") against Reader's Digest Association, Inc. ("Reader's Digest") to obtain injunctive relief and recover civil penalties pursuant to sections 5(*l*) and 16(a)(1) of the Federal Trade Commission Act (the "Act"),[1] for alleged violations of a consent order. The order required

---

1. 15 U.S.C. §§ 45(*l*) and 56(a)(1) (1976). Section 5(*l*) provides:

> (*l*) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. . . . In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

Section 16(a)(1) of the Act authorizes the Federal Trade Commission ("FTC" or the "Commission") to commence a civil penalty action in its own name in the event the Attorney General fails to do so within 45 days after receipt of written notice from the Commission.

Reader's Digest, which regularly uses a promotional device known as a "sweepstakes" in its business of selling and distributing magazines, books and other products, to cease and desist from engaging in various practices in connection with any sweepstakes or other similar promotional device. Among the practices proscribed were the use or distribution of "simulated checks" or "any confusingly simulated item of value."[2] The complaint alleges that Reader's Digest violated the order by distributing an item labeled a "TRAVEL CHECK" and another item labeled a "CASH-CONVERTIBLE BOND" in connection with two different sweepstakes.

The principal issues in a civil penalty action are whether the defendant violated the FTC order in question and, if so, what amount of money should be assessed as a penalty.[3] This case is presently before the Court on Reader's Digest's motion for summary judgment and the Government's motion for partial summary judgment on the issue of liability and to strike two affirmative defenses raised by Reader's Digest in its answer.[4] The challenged defenses are: (1) that the FTC violated Reader's Digest's constitutional right to substantive and procedural due process by implementing and interpreting the consent order in an arbitrary and capricious manner and (2) that the Government's claims are barred by laches, waiver and estoppel.[5] The defendant also denies that it violated the consent order.

---

2. Docket Item 1, ex. A, par. II.C(3).

3. Section 5(*l*) of the Act authorizes imposition of a civil penalty of "not more than $10,000 for each violation" of an order of the FTC. The actual amount of the penalty, provided it does not exceed the statutory maximum, is left to the informed discretion of the district court judge. *United States v. J. B. Williams Co.*, 498 F.2d 414, 438 (C.A.2, 1974).

4. Docket Items 35 and 14.

5. Docket Item 4, pars. 11 and 12; Docket Item 9, Answers to Plaintiff's Interrogatories, Nos. 10 and 11.

To the extent that Reader's Digest's affirmative defenses do not overlap with its more general denial of liability, the Court concludes that they do not provide a basis for avoiding liability in this case.[6] The defendant has cited no authority for the proposition that the due process clause requires the FTC to afford those subject to a consent order notice and a hearing prior to instituting a civil penalty action, and the Court has found none. The courts that have addressed the issue have refused to impose such a requirement.[7] The equitable defenses of laches, waiver and estoppel have no application here, because they are based on actions taken in the public interest by members of the Commission's staff. *See FTC v. Algoma Lumber Co.*, 291 U.S. 67, 80, 54 S.Ct. 315, 78 L.Ed. 655 (1933); *United States v. Vulcanized Rubber & Plastics Co.*, 178 F.Supp. 723, 726 (E.D.Pa.1959). Similarly, Reader's Digest's good faith or lack of intent has no bearing on the question of liability in this civil penalty action. *United States v. Ancorp National Services, Inc.*, 516 F.2d 198, 202 (C.A.2, 1975); *United States v. Vitasafe Corp.*, 212 F.Supp. 397 (S.D.N.Y.1962); *United States v. Karns*, 1963 Trade Cases ¶ 70,950 (S.D. N.Y.1963).

---

6. Reader's Digest effectively conceded as much in its opening brief, contending only that the motion to strike is premature because the affirmative defenses would be relevant to the penalty issue should liability be found. Docket Item 37, p. 2 note.

7. *See United States v. J. B. Williams Co., supra*, 498 F.2d at 434-35; *United States v. Beatrice Foods Co.*, 493 F.2d 1259, 1265-69 (C.A.8, 1974).

The Commission's regulations expressly provide that it may institute civil penalty proceedings to enforce compliance with an order "without prior notice of any kind to a respondent." 15 C.F.R. § 3.61.

The Court will deny the motion to strike the affirmative defenses, however, for two reasons. First, the good faith of the defendant and the alleged lack of notice are among the factors to be considered by the Court in determining the penalty, if any, to be imposed. *See United States v. Papercraft Corp.*, 540 F.2d 131, 141 (C.A.3, 1976); *United States v. Ancorp National Services, Inc., supra,* 516 F.2d at 202; *United States v. Wilson Chemical Co.*, 1962 Trade Cases ¶ 70,478 (W.D.Pa. 1962), *aff'd,* 319 F.2d 133 (C.A.3, 1963). Second, this case is not unduly complicated and the Government has not shown that it is prejudiced in any way by the presence of the challenged defenses. *See Tivoli Realty, Inc. v. Paramount Pictures, Inc.*, 80 F.Supp. 800, 803 (D.Del.1948); 2A Moore's Federal Practice ¶ 12.21, p. 2431 & n. 30 (2d ed. 1975).

The Court now turns to the sole issue presented by the pending cross-motions for summary judgment; that is, whether the distribution by Reader's Digest of the Travel Check or Cash-Convertible Bond or both violated the terms of the consent order.

## BACKGROUND

Congress has directed the FTC "to prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce."[8] Acting pursuant to this mandate, the FTC conducted an investigation in 1970 of the practices employed by Reader's

8. Section 5(a)(2) of the Act, 15 U.S.C. § 45(a)(2) (1976). At the time the consent order was issued, the authorization quoted in the text applied only to acts or practices "in commerce" and was codified at 15 U.S.C. § 45(a)(6) (1970). *See* Pub.L. No. 94-145, § 3, 89 Stat. 801 (1975); Pub.L. No. 93-637, § 201(a), 88 Stat. 2193 (1974).

Digest and several other corporations in connection with various promotional sweepstakes. Ultimately, the Commission notified Reader's Digest that it intended to issue a complaint against the company alleging that some of its practices were unfair or deceptive and therefore in violation of section 5 of the Act. Settlement negotiations ensued and resulted in a consent order in which Reader's Digest agreed to cease and desist from most of the practices mentioned in the complaint. The consent order together with the proposed FTC complaint were issued on November 2, 1971.[9] The order became final on January 15, 1972 and, except for a modification on March 5, 1974 in respects not material to this action, the order has been in full force from that date to the present time.[10]

Paragraph II.C(3) of the consent order provides:

II

IT IS ORDERED that Reader's Digest Association, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, advertising, offering for sale, sale or distribution of magazines, books, or other products in commerce as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

C. . . . .

(3) Using or distributing simulated checks, currency, "new car certificates;" or using or distributing any confusingly simulated item of value.

---

9. FTC Docket C-2075, reported at 79 FTC Decisions 696. The consent order and the administrative complaint are attached to the complaint in this action (Docket Item 1) as exhibits A and B.

10. Docket Items 1 and 4, par. 5. The procedure governing the development and issuance of consent orders is set forth in 15 C.F.R. Subpart C, §§ 2.31 *et seq.*

The Government contends that two different items distributed by Reader's Digest in connection with the offering for sale of Reader's Digest magazine contravened Paragraph II.C(3). The first item, a "TRAVEL CHECK", was distributed during the first half of 1973 as part of a twelve-page promotional pamphlet called a "Sweepstakes Passport."[11] The Travel Check is printed on light green and blue paper, is approximately the same size as a real traveler's check, has traditional checkstyle borders, and purports to be for "100 Dollars a Month for Life."[12] The Government alleges that the Travel Check violates the proscription against the use of "simulated checks."

The second item is labeled a "CASH-CONVERTIBLE BOND" and it was part of a packet of sweepstakes literature distributed in November, 1973 and October, 1974.[13] As with the Travel Check, the Bond is printed against an official looking background.[14] The Government contends the Cash-Convertible Bond is a "confusingly simulated item of value" within the meaning of Paragraph II.C(3) of the consent order.

---

11. Between February 26 and June 30, 1973, Reader's Digest sent out 13,898,521 of the Travel Checks. Docket Item 9, Answers to Plaintiff's Interrogatories, No. 3(b).

12. A copy of the Travel Check appears as exhibit 1 in the appendix to this opinion.

13. A total of 4,042,000 of the Cash-Convertible Bonds were sent out by Reader's Digest. Docket Item 9, Answers to Plaintiff's Interrogatories, No. 3(b).

14. A copy of the Cash-Convertible Bond appears as exhibit 2 in the appendix to this opinion. Reader's Digest enclosed three different Bonds in each sweepstakes packet having face values of one hundred dollars a month for life, $2,000 a month for a year and $24,000, respectively. The three Bonds have slightly different formats but the differences are immaterial for purposes of this litigation.

To decide whether the Travel Check or the Cash-Convertible Bond violated the order, the Court must engage in a two-step analysis: (1) determining what the order means and (2) deciding whether the challenged advertisements come within the order as construed. *United States v. J. B. Williams Co., supra,* 498 F.2d at 430-31. Furthermore, in an action to recover civil penalties the court's role is not to determine whether the challenged practice is deceptive, but merely to consider whether the practice falls within the order's proscription. *United States v. Vulcanized Rubber & Plastics Co.,* 288 F.2d 257, 258 n. 2 (C.A.3, 1961); *see United States v. Morton Salt Co.,* 334 U.S. 37, 54, 68 S.Ct. 822, 92 L.Ed. 420 (1948). A dispute exists in this case, however, as to whether Paragraph II.C(3) should be construed to require some proof that prohibited advertisements actually cause consumer confusion or deception. No evidence of actual confusion has been presented with respect to either of the items in question here.

## I. *REQUIREMENT OF PROOF OF CONFUSION*

Reader's Digest contends that the order should be construed to require at least some evidence of actual confusion or deception before an advertisement can be found to have violated the ban against using "simulated checks" or "confusingly simulated items of value." Reader's Digest points to two different sources for such an evidentiary requirement. First, it argues that the consent order by its own terms requires proof of confusion. In the alternative, it contends that the recently recognized right of commercial speech to First Amendment protection requires that the consent order be construed narrowly to require proof of confusion. The Court will consider these contentions in turn.

A. *The Consent Order*

Paragraph II.C(3) requires Reader's Digest to cease and desist from:

> (3) Using or distributing simulated checks, currency, "new car certificates;" or using or distributing any confusingly simulated item of value.

The prohibition is not a model of clarity and the word "confusingly" in the second clause accounts for much of the ambiguity. It is not clear from the face of the order whether the adjective "confusingly" was intended to modify the items mentioned in the first clause of Paragraph II.C (3) as well as the second. More importantly, the language of the order does not indicate whether or not the term "confusingly" was meant to impose upon the FTC the burden of proving actual confusion to establish a violation. Resolution of these ambiguities depends upon the intentions of the FTC and Reader's Digest at the time they entered into the consent order.

The agreement containing the consent cease and desist order at issue here provides that: "The complaint may be used in construing the terms of the order."[15] The administrative complaint is particularly helpful in construing Paragraph II.C(3). In Paragraph 5 of the complaint, the Commission reproduced among other things a "check" for $100 dollars a month for life and a "New Car Certificate" for a 1970 Ford Mustang as being typical and illustrative of the statements and representations made by Reader's Digest in its sweepstakes.[16] The complaint further alleged:

---

15. Docket Item 1, ex. C, par. 6.

16. Docket Item 1, ex. B, pp. 6-8. A copy of the "check" shown in the administrative complaint appears as exhibit 3 in the appendix to this opinion.

PARAGRAPH SIX: By and through the use of the above-quoted statements and representations, and others of similar import and meaning not expressly set out herein, respondent represented directly or by implication, that:

* * * * * *

(q) Simulated checks, "money" and other negotiable instruments and simulated "New Car Certificates" received by individuals from the respondent are valuable and can be cashed, redeemed, or exchanged for United States currency or for a new car.[17]

The complaint concludes with the averment that the aforesaid practices and others not relevant to this action have "the capacity and tendency to mislead members of the purchasing public . . . and ha[ve] induced many members of the public to participate in respondent's 'sweepstakes'," and are therefore unfair and deceptive acts or practices in violation of section 5 of the Act.[18]

A cease and desist order must be interpreted in light of its principal purpose. *United States v. J. B. Williams Corp., supra,* 498 F.2d at 431. When viewed in light of the administrative complaint, it is obvious that Paragraph II.C(3) was intended to prevent the distribution of simulated checks, money and new car certificates similar to those contained in the complaint and all *other* confusingly simulated items of value.[19] In other words, the adjective "confusingly" was meant to modify the specific items mentioned in the first clause of the paragraph and those items

17. *Id.* pp. 9-10.

18. *Id.* p. 14.

19. The parties do not disagree with this interpretation; they differ as to the importance of the term "confusingly."

are simply examples of material generically described in the second clause as "confusingly simulated item[s] of value."

Reader's Digest would construe the phrase "confusingly simulated item of value" to encompass only items that can be shown to have confused consumers. That is not the only possible construction, however, and the Court concludes that it does not reflect the parties' original intention. If the Government were seeking to enforce the Act's prohibition of unfair or deceptive advertising in an original administrative proceeding, it would be required to prove only that the challenged material has a tendency or capacity to deceive. Thus, the Commission's findings have been sustained despite the absence of evidence that the challenged advertising actually misled or confused customers. *See Beneficial Corp. v. FTC,* 542 F.2d 611, 617 (C.A.3, 1976), *cert. denied,* 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977). Where, as here, the Commission issued an administrative complaint reflecting its belief that certain practices were deceptive or confusing, and then entered into a consent order which required the respondent to cease and desist from employing those and similar practices, it is extremely unlikely that the Commission intended to subject itself to a more rigid evidentiary burden. Nothing in the record suggests that the Commission so intended.

Rather, the Court finds that the Commission used the phrase "confusingly simulated" in the second clause of Paragraph II.C(3) in an attempt to generalize the proscription contained in the first clause. As the Supreme Court stated in *FTC v. Ruberoid Co.,* 343 U.S. 470, 473, 72 S.Ct. 800, 803, 96 L.Ed. 1081 (1952):

> If the Commission is to attain the objectives Congress envisioned, it cannot be required to confine its road block to the narrow lane the transgressor has traveled; it must be allowed effectively to close all roads

to the prohibited goal, so that its order may not be by-passed with impunity.

The Commission had the authority to frame its order broadly to prevent Reader's Digest from engaging in similarly illegal practices in future advertisements. And having decided to enter into a consent order rather than contest the FTC's complaint, Reader's Digest "must expect some fencing in." *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374, 395, 85 S.Ct. 1035, 13 L.Ed.2d 904 (1965); see *FTC v. National Lead Co.*, 352 U.S. 419, 428-30, 77 S.Ct. 502, 1 L.Ed.2d 438 (1957); *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 611, 66 S.Ct. 758, 90 L.Ed. 888 (1946).

The prohibited goal in this case was the inducement of participation in sweepstakes by means of items that appeared to be valuable but in fact were not. The Court holds that the phrase "confusingly simulated item of value" in the consent order was meant to apply to advertising material that is similar to the items mentioned in the complaint and, on its face, could be said to have the same capacity or tendency to mislead consumers. Thus, the Court rejects Reader's Digest's argument that the language of the consent order should be construed to require proof of actual confusion to support a finding that either the Travel Check or the Cash-Convertible Bond violated the order.

Nevertheless, if Reader's Digest is correct in its contention that the First Amendment requires proof of confusion or deception before commercial speech can be restrained, the Court would have to resolve the ambiguity in the language of Paragraph II.C(3) in favor of such a requirement.

B. *First Amendment*

In 1942 the Supreme Court held that the First Amendment does not protect "purely commercial advertising"

from government regulation.[20] Although the principle that commercial speech is unprotected was questioned and undermined by a few later decisions,[21] it survived until 1976, when the Court held in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 761-62, 96 S.Ct. 1817, 1825, 48 L.Ed.2d 346, that "speech which does 'no more than propose a commercial transaction' " is not "wholly outside the protection of the First Amendment."

Before exploring the contours of the First Amendment interests in this case, the Court must determine whether Reader's Digest has waived its right to challenge the order on First Amendment grounds. In 1971, when it entered into the consent order, Reader's Digest waived its right to:

(a) Any further procedural steps;

---

20. *Valentine v. Chrestensen*, 316 U.S. 52, 62 S.Ct. 920, 86 L.Ed. 1262 (1942).

21. For example, in a concurring opinion in *Cammarano v. United States*, 358 U.S. 498, 514, 79 S.Ct. 524, 3 L.Ed.2d 462 (1959), Justice Douglas described the *Chrestensen* ruling as being "casual, almost offhand." The Court expressly declined to rely on an absolute rule that commercial speech is unprotected in *Pittsburgh Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 93 S.Ct. 2553, 37 L.Ed.2d 669 (1973). There the Court upheld an ordinance prohibiting sex-designated help-wanted advertisements on the more narrow ground that the commercial activity in question was itself illegal. 413 U.S. at 388-89, 93 S.Ct. 2553. Lastly, the demise of the commercial speech exception was foreshadowed in *Bigelow v. Virginia*, 421 U.S. 809, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), in which the Court reversed the conviction of a Virginia newspaper editor under a Virginia statute for publishing an advertisement concerning the availability of legal abortion services in New York. The Court in *Bigelow* rejected the proposition that advertising is unprotected per se, but then distinguished *Chrestensen* on the ground that the abortion advertisement communicated information of public interest and thus was not "purely commercial." 421 U.S. at 818-25, 93 S.Ct. 2553. *See generally* Meiklejohn, *Commercial Speech and the First Amendment: An Emerging Doctrine*, 5 Hof.L.Rev. 655 (1977); Redish, *The First Amendment in the Marketplace: Commercial Speech and the Values of Free Expression*, 39 Geo.Wash.L.Rev. 429 (1971).

(b) The requirement that the Commission's decision contain a statement of findings of fact and conclusions of law; and

(c) All rights to seek judicial review or otherwise to challenge or contest the validity of the order entered pursuant to this agreement.[22]

Reader's Digest contends that it should not be held to have waived its First Amendment argument, because advertising did not enjoy First Amendment protection until five years after the consent order was issued. The Court agrees.

A waiver is "an intentional relinquishment . . . of a *known* right or privilege." *Johnson v. Zerbst,* 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461 (1938) (emphasis supplied). In *Curtis Publishing Co. v. Butts,* 388 U.S. 130, 87 S.Ct. 1975, 18 L.Ed.2d 1094 (1967), a majority of the Justices of the Supreme Court found that no waiver had occurred in circumstances similar to those in this case. The *Curtis* case involved an action for defamation of a public figure; the defendant had asserted no constitutional defenses before trial. Shortly after the verdict was returned, the Supreme Court decided *New York Times Co. v. Sullivan,* 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), holding that the First Amendment requires proof of "actual malice" before a public official may recover damages for a defamatory falsehood. *Id.* at 279-80, 84 S.Ct. 710. Justice Harlan, writing for the plurality in *Curtis Publishing,* concluded that the defendant had not waived its right to assert the previously unrecognized constitutional arguments by failing to assert them before trial. 388 U.S. at 142-45, 87 S.Ct. 1975.[23] He also stated that:

---

22. Docket Item 1, ex. C, par. 3.

23. At least two other Justices expressed approval of the plurality's requirement of a knowing waiver in *Curtis.* 388 U.S. at 172 n. 1, 87 S.Ct. 1975 (Brennan, J., with White, J., dissenting); *see id.* at 167-68, 87 S.Ct. 1975 (Warren, C. J., concurring).

> Where the ultimate effect of sustaining a claim of waiver might be an imposition on that valued freedom [of speech], we are unwilling to find waiver in circumstances which fall short of being clear and compelling.

*Id.* at 145, 87 S.Ct. at 1986. Prior to 1976, "purely commercial speech" like the Travel Check or Cash-Convertible Bond at issue here was not afforded First Amendment protection. *See Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 758-61, 96 S.Ct. 1817. Therefore, for the reasons stated in *Curtis Publishing, supra,* the Court concludes that Reader's Digest did not waive its right to challenge the consent order on First Amendment grounds.[24]

Turning to the merits of Reader's Digest's constitutional argument, the Court notes first that some forms of commercial speech regulation are still permissible. Appropriate time, place and manner restrictions may be imposed on commercial speech and false or misleading advertisements

---

24. *See generally* Comment, *Waiver of a Previously Unrecognized Defense: Must Lawyers Be Seers,* 114 U.Pa.L.Rev. 451 (1966).

The fact that a consent order is involved in this case does not compel a different result. *See United States v. Swift & Co.,* 286 U.S. 106, 52 S.Ct. 460, 76 L.Ed 999 (1932) (court of equity has power to modify a consent order); *United States v. Marchetti,* 466 F.2d 1309, 1317 (C.A.4), *cert. denied,* 409 U.S. 1063, 93 S.Ct. 553, 34 L.Ed.2d 516 (1972) (one who contracts with the Government cannot unknowingly waive his First Amendment rights).

Of course, a newly recognized constitutional argument also must be asserted seasonably. In this case, the civil penalty action was commenced in July, 1975; *Virginia Board of Pharmacy* was not decided until May, 1976. Under the FTC's regulations, Reader's Digest could have petitioned for a reopening of the original administrative proceeding on the basis of a change in the law. 15 C.F.R. § 372(b)(2). Because the parties have not addressed the need for administrative exhaustion with respect to the First Amendment issue, the Court will not consider it. *See Warner-Lambert Co. v. FTC,* 562 F.2d 749, 770-71 & n. 8 (C.A.D.C. 1977) (supplemental hearing on petition for rehearing).

may be forbidden. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra,* 425 U.S. at 770-72, 96 S.Ct. 1817; *Bates v. State Bar of Arizona,* 433 U.S. 350, 383-84, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977); *Linmark Associates, Inc. v. Township of Willingboro,* 431 U.S. 85, 93-94, 98, 97 S.Ct. 1614, 52 L.Ed.2d 155 (1977). In *Virginia Board of Pharmacy* the Court observed:

> Obviously, much commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no obstacle to a State's dealing effectively with this problem. The First Amendment, as we construe it today, does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.

425 U.S. at 771-72, 96 S.Ct. at 1830 (footnote omitted). Reader's Digest does not contest the authority of the Government to prohibit the use of deceptive advertising. Instead, it argues that to justify the prohibition against the use of a particular advertisement, the Government must produce at least some evidence that the advertisement actually deceived consumers. To support this position, Reader's Digest cites *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), which struck down a disciplinary rule prohibiting lawyers from advertising in newspapers. In *Bates,* the State Bar attempted to justify the ban on *all* lawyer advertising on the ground that such advertising is inherently misleading. The Court examined that justification and found that, in fact, it was not true. *Id.* at 372-75, 97 S.Ct. 2691. The Court also found no support in the record for the State Bar's contention that the particular advertisement at issue in *Bates* was misleading.

Thus, the advertisement was held to be protected by the First Amendment and not subject to restraint. *Id.* at 381-82, 97 S.Ct. 2691.

The instant case is distinguishable from *Bates* in two important respects. The first distinction derives from the different procedural postures of the two cases. The factual predicate for Paragraph II.C(3) of the consent order is the FTC's belief that the simulated check and new car certificate included in the administrative complaint are deceptive. Reader's Digest could have challenged the FTC's belief in an administrative hearing and then obtained judicial review of an adverse decision under the substantial evidence test. *See Beneficial Corp. v. FTC, supra,* 542 F.2d at 616-18. However, by entering into the consent order, the defendant relinquished its right to contend that the items mentioned in the original complaint were not deceptive and in violation of section 5 of the Act. *See FTC v. Jantzen, Inc.,* 383 F.2d 981, 983 (C.A.9, 1967); *United States v. Vitasafe Corp.,* 212 F.Supp. 397, 398 (S.D.N.Y.1962) and 234 F.Supp. 710, 711 & n. 2 (S.D.N.Y.1964), *aff'd,* 352 F.2d 62 (C.A.2, 1965). Therefore, this Court will assume that the check and the new car certificate were deceptive. In contrast to the situation in *Bates* then, there is at least some basis in the record of this case for concluding that the advertising being regulated is deceptive.

The second distinguishing factor between this case and *Bates* is the nature of the regulation being challenged. The *Bates* case involved a prohibition against the publication of a "truthful advertisement concerning the availability and terms of routine legal services." The Court ruled "simply that the flow of such information may not be restrained." 433 U.S. at 384, 97 S.Ct. at 2709. The ban in Paragraph II.C(3) on the use of "any confusingly simulated item of

value," on the other hand, does not restrain Reader's Digest from communicating the terms of its sweepstakes promotions to the public. The consent order merely prohibits the communication of such information in a form that the Government considers misleading or deceptive. Paragraph II.C(3), therefore, represents a restriction on the manner of speech that Reader's Digest may use to convey its message, rather than a restriction on the content of the message. "This distinction is not without significance to First Amendment analysis, since laws regulating the time, place or manner of speech stand on a different footing from laws prohibiting speech altogether." *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93, 97 S.Ct. at 1618.

The other cases Reader's Digest relies upon to support its argument that to establish a violation the Government must produce at least some evidence that the Travel Check and the Cash-Convertible Bond in fact deceived or confused consumers are also inapposite. None of those cases involved "purely commercial speech,"[25] while the instant case does. In *Virginia Board of Pharmacy,* the Court stated that:

> There are commonsense differences between speech that does "no more than propose a commercial transaction" . . . and other varieties. . . . [, which] suggest that a different degree of protection is necessary to insure that the flow of truthful and legitimate commercial

25. Reader's Digest cited *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 98 S.Ct. 1407, 55 L.Ed.2d 707 (1978), which involved a statute prohibiting banks from expending funds for the purpose of influencing the vote on referendums not affecting their business interests. The other two cases cited bear even less relation to the issues before this Court. *See Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 89 S.Ct. 1794, 23 L.Ed.2d 371 (1969); *Wood v. Georgia,* 370 U.S. 375, 82 S.Ct. 1364, 8 L.Ed.2d 569 (1962).

> information is unimpaired. . . . [C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and foregone entirely.
>
> Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker. . . . *They may also make it appropriate to require that a commercial message appear in such a form, or include such additional information, warnings and disclaimers, as are necessary to prevent its being deceptive. . . . They may also make inapplicable the prohibition against prior restraints.*

425 U.S. at 771-72 n. 24, 96 S.Ct. at 1830 n. 24 (citations omitted) (emphasis supplied).[26] In a more recent case the Court again recognized the "commonsence [sic] differences" between commercial and other speech, stating that it has

> afforded commercial speech a limited measure of protection, commensurate with its subordinate position

---

26. Justice Stewart expanded upon this theme in a concurring opinion in the *Virginia Board of Pharmacy* case. 425 U.S. at 777-81, 96 S.Ct. 1817.

The precise effect of the recently recognized right of commercial speech to First Amendment protection on the ability of the FTC to carry out its mandate to prevent "unfair or deceptive acts or practices in or affecting commerce" is not yet clear. A few commentators have explored the issue and come to different conclusions. *See* Reich, *Consumer Protection and the First Amendment: A Dilemma for the FTC?* 61 Minn.L.Rev. 705 (1977); Note, *Yes, FTC, There is a Virginia: The Impact of Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc. on the Federal Trade Commission's Regulation of Misleading Advertising,* 57 B.Univ.L.Rev. 833 (1977). *See also* Pitofsky, *Beyond Nader: Consumer Protection and the Regulation of Advertising,* 90 Harv.L. Rev. 661 (1977).

in the scale of First Amendment values, while allowing modes of regulation that might be impermissible in the realm of non-commercial expression.

*Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 98 S.Ct. 1912, 1918, 56 L.Ed.2d 444 (1978); *see Bates v. State Bar of Arizona, supra,* 433 U.S. at 383, 97 S.Ct. 2691; *Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 98, 97 S.Ct. 1614. To determine the level of protection due the advertising material challenged in this case, the Court must undertake "the task of assessing the First Amendment interest at stake and weighing it against the public interest allegedly served by the regulation." *Bigelow v. Virginia,* 421 U.S. 809, 826, 95 S.Ct. 2222, 2235, 44 L.Ed.2d 600 (1975).

The Government's interest in preventing the use of deceptive advertising is a legitimate and important one. As noted earlier, Reader's Digest is precluded from challenging the Government's belief that the simulated check and other items included in the administrative complaint are deceptive. Thus, the Court will assume that those items are deceptive and hence not entitled to First Amendment protection. Furthermore, it is well-settled that the FTC could frame its order broadly enough to prevent Reader's Digest from engaging in similarly deceptive practices in future sweepstakes promotions. *See FTC v. Mandel Brothers, Inc.,* 359 U.S. 385, 392, 79 S.Ct. 818, 3 L.Ed.2d 893 (1952); *National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, 164 (C.A.7, 1977), *cert. denied,* ..... U.S. ....., 99 S.Ct. 86, 58 L.Ed.2d 113 (1978); *Fedders Corp. v. FTC,* 529 F.2d 1398, 1401 (C.A.2, 1976).

The fact that a violation of section 5 of the Act has been established, however, does not permit the Government to ignore First Amendment interests. In *Beneficial Corp. v.*

*FTC*,[27] the Third Circuit reviewed a cease and desist order issued by the FTC that forced Beneficial "to abandon entirely its copyrighted and heavily promoted phrase ['Instant Tax Refund']." 542 F.2d at 618. Although the court upheld the Commission's finding that previous "Instant Tax Refund" advertising campaigns were deceptive, it refused to enforce the order proscribing use of that term or any other words of similar meaning on the ground that the order went further than was necessary to eliminate the deception. *Id.* at 620. Reader's Digest relies heavily on *Beneficial Corp. v. FTC*. The Court agrees that *Beneficial* sets forth the standard to be used in judging the constitutionality of Paragraph II.C(3), but it does not dictate the result in this case. The Third Circuit considered the copyrighted phrase "Instant Tax Refund" to be a valuable business asset which, like a trade name, could not be ordered excised completely from advertising absent a finding that qualifying language could not eliminate its offensive features.[28] The Travel Check and Cash-Convertible Bond do not possess those qualities and, therefore, do not require the same high level of protection.[29]

---

27. 542 F.2d 611 (C.A.3, 1976), *cert. denied*, 430 U.S. 983, 97 S.Ct. 1679, 52 L.Ed.2d 377 (1977).

28. *Beneficial Corp. v. FTC*, *supra*, 542 F.2d at 619-20. The court relied on *Jacob Siegel Co. v. FTC*, 327 U.S. 608, 66 S.Ct. 758, 90 L.Ed. 888 (1946), and *FTC v. Royal Milling Co.*, 288 U.S. 212, 53 S.Ct. 335, 77 L.Ed. 796 (1933), both of which described a statutory limitation on the Commission's authority, and held that the rule announced in the latter case had evolved into a general statement of constitutional principle. *Id.* at 620.

29. The *Beneficial* case also stressed the fact that any prior restraint on speech is suspect. 542 F.2d at 619-20. When "purely commercial speech" is involved, however, the Supreme Court has stated that the prohibition against prior restraints may be inapplicable. *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, *supra*, 425 U.S. at 772 n. 24, 96 S.Ct. 1817; *Ohralik v. Ohio State Bar Ass'n*, *supra*, 436 U.S. at 455, 98 S.Ct. at 1918.

According to Reader's Digest, its First Amendment rights would be impermissibly infringed if the consent order were construed to go beyond proscribing the use of simulated items of value that can be shown to be confusing to consumers. However, the possibility that the consent order, if not limited, to provably deceptive advertising, might curtail some protected commercial speech does not necessarily mean that it is unconstitutional. On its belief that Reader's Digest had violated section 5 of the Act, the FTC was empowered to fashion appropriate restraints on Reader's Digest's future activities to avoid a recurrence of the violation. *Cf. National Society of Professional Engineers v. United States,* 435 U.S. 679, 697-98, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). To the extent it is necessary to achieve that objective effectively, the FTC may abridge Reader's Digest's First Amendment freedoms. *Cf. id.; see Warner-Lambert Co. v. FTC,* 562 F.2d 749, 763 n. 68 (C.A. D.C. 1977), *cert. denied,* 435 U.S. 950, 98 S.Ct. 1575, 55 L.Ed.2d 800 (1978).

In the circumstances of this case, the Court holds that Paragraph II.C(3) passes constitutional muster without a requirement of proof of deception. Given the incontestable premise that the simulated check included in the administrative complaint is deceptive, the Government's presumption that all similarly simulated items of value probably will be deceptive is not unreasonable. A prophylactic rule aimed at preventing the harm alleged in the original complaint therefore seems appropriate. In addition, the effectiveness of the Government's efforts to prevent such deception would be substantially diminished if it were required to prove actual harm. *See Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 466, 98 S.Ct. at 1924. These governmental interests substantially outweigh the free speech interests abridged by Paragraph II.C(3). The commercial

speech affected does not concern a matter of important public interest. More importantly, the Court perceives little likelihood of a chilling effect on Reader's Digest's efforts to market its products by way of promotional sweepstakes, because the regulation affects only the form of the message not its content. The ban on the use of "any confusingly simulated item of value" leaves open ample alternative channels for communicating sweepstakes numbers and related information to consumers. *Compare Linmark Associates, Inc. v. Township of Willingboro, supra,* 431 U.S. at 93-94, 97 S.Ct. 1614. "It is not difficult to choose statements, designs, and devices that will not deceive." *United States v. 95 Barrels of Vinegar,* 265 U.S. 438, 443, 44 S.Ct. 529, 531, 68 L.Ed. 1094 (1924), *quoted in Virginia State Board of Pharmacy v. Virginia Citizens Consumers Council, Inc.,* 425 U.S. at 772 n. 24, 96 S.Ct. 1817. In short, the "commonsense differences" between the speech regulated by the consent order and other varieties and the fact that Paragraph II.C(3) is essentially a manner restriction make "the absence of explicit proof or findings of harm or injury . . . immaterial." *Ohralik v. Ohio State Bar Association, supra,* 436 U.S. at 468, 98 S.Ct. at 1925.

The defendant's remaining constitutional arguments are without merit. For example, Reader's Digest correctly points out that the order must be "as specific as the circumstances will permit." *FTC v. Colgate-Palmolive Co.,* 380 U.S. 374, 393, 85 S.Ct. 1035, 1047, 13 L.Ed.2d 904 (1965); *National Commission on Egg Nutrition v. FTC,* 570 F.2d 157, 164 (C.A. 7, 1977), *cert. denied,* ..... U.S. ....., 99 S.Ct. 86, 58 L.Ed.2d 113 (1978). The Court finds that Paragraph II.C(3), when viewed in light of the administrative complaint, meets that standard. It is difficult to imagine how the order could have been drawn more narrowly without

permitting Reader's Digest to evade its principal purpose. In the same vein, the Court is satisfied that the order gave Reader's Digest fair notice of what was proscribed. *See Grayned v. City of Rockford,* 408 U.S. 104, 109, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Thus, the Court rejects the argument that Paragraph II.C(3) is unconstitutionally vague.[30]

Having concluded that actual harm need not be shown to establish a violation of the consent order, the Court proceeds to consider whether either or both of the challenged items fall within the proscription of Paragraph II.C(3).

## II. *THE TRAVEL CHECK*

The Government contends that the Travel Check distributed by Reader's Digest is a "simulated check" within the meaning of the order. It is for the Court to decide whether the order in fact has been violated; no special deference is due the judgment of the FTC on this issue. *See United States v. J. B. Williams Co., supra,* 498 F.2d at 429. In accordance with the terms of the consent agreement,[31] the Court will look to the administrative complaint for assistance in construing Paragraph II.C(3). Otherwise, the terms "simulated check" and "confusingly simulated item of value" will be given their ordinary meaning.

Webster's New World Dictionary (2d College ed. 1976) defines "simulate" as a verb meaning "1. to give a false indication or appearance of; pretend; feign . . . 2. to have

30. It is unclear whether Reader's Digest is challenging the order on grounds of overbreadth as well. Such an argument would not be well-founded, because the doctrine of overbreadth "applies weakly, if at all, in the ordinary commercial context." *See Bates v. State Bar of Arizona, supra,* 433 U.S. at 380, 97 S.Ct. at 2707; *Ohralik v. Ohio State Bar Ass'n, supra,* 436 U.S. at 462, 98 S.Ct. at 1922 n. 20.

31. Docket Item 1, ex. C, par. 6.

or take on the external appearance of; look or act like." According to The Random House College Dictionary (1973), "simulate" means "to assume or have the appearance or characteristics of; imitate." A traveler's check is a widely recognized type of check. Reader's Digest's "Travel Check," which appears as exhibit 1 in the appendix to this opinion, has the appearance of or imitates a real traveler's check or, at least, gives a false indication of being one; therefore, the Court concludes that it is a simulated check.

To violate the order as construed here, however, the Travel Check must be a "confusingly simulated check." In the present context, the word "confusingly" denotes that the challenged item must have a capacity to confuse or mislead consumers comparable to that of the "check" included in the administrative complaint. (A copy of the "check" appears as exhibit 3 in the appendix.) Several striking similarities between the Travel Check and the original check make the conclusion that the former is confusingly simulated almost inescapable. Both items are the approximate size of actual checks and have been printed on colored paper with traditional check-style borders in an obvious attempt to create an air of authenticity. The check states "Pay the sum of $100 DOLLARS A MONTH FOR LIFE" directly above the recipient's name, while the Travel Check provides that the same sum "will be paid to the order of:" the recipient. Both items contain legends in small type stating that they are "not negotiable" and instructing the recipient that he must return the entire sweepstakes package to be eligible to win. The Travel Check contains three sweepstakes numbers; the original check informs the recipient that he has been selected to receive six "Lucky Numbers."

Reader's Digest points to several differences between the original check and the Travel Check to support its argument that the latter is not prohibited.

> For example, the original "check" contained a number in the upper right hand corner in the same way that a real check would be numbered. The "check" said: "Pay the sum of", followed by printed numerals and letters similar to the printing that would be used on a real check. Following that printing, the "check" contained a line where there appeared the handwritten amount as would appear on an actual check. It also included the phrase "non-transferable" and stated: "Valid only if returned before March 24." Finally, as with a real check, the "check" contained a signature line and a place for the date and was blank on the back side.

Defendant's Opening Brief, Docket Item 37, p. 34. The Court finds these differences insignificant.[32] The FTC "is not limited to prohibiting the illegal practice in the precise form in which it [was] found to have existed in the past." *FTC v. Ruberoid Co., supra,* 343 U.S. at 473, 72 S.Ct. at 803. The principal purpose of the consent order was to prevent the distribution of any confusingly simulated item

---

32. One flaw in the defendant's reasoning is its assumption that most members of the general public have a detailed knowledge of what an actual traveler's check looks like. The Court is unwilling to make that assumption.

With respect to the fact that the reverse sides of the Travel Check and the Cash-Convertible Bond contain advertising copy, the Court notes first that the faces of both items are complete in themselves. Moreover, the placement of the Travel Checks as the center page of a twelve-page sweepstakes pamphlet makes it unlikely that the consumer would notice the printing on their reverse sides. Finally, the printing on the back of the Cash-Convertible Bond does not detract from its appearence of authenticity, since many real bonds have print on their reverse sides.

of value, not just the items specifically mentioned in the administrative complaint. That purpose would be frustrated if Reader's Digest were able to avoid the order's proscription by using such slight changes in wording and minor variations in format. *See United States v. Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, 259-60 (C.A.3, 1961), *aff'g* 178 F.Supp. 723 (E.D.Pa.1959); *In re Whitney & Co.*, 273 F.2d 211, 214 (C.A.9, 1959).

Reader's Digest's allegation that it made the changes noted above in order to insure that the Travel Check could not be mistaken for an actual check is irrelevant. As the Supreme Court stated in *FTC v. Colgate-Palmolive Co., supra,* 380 U.S. at 393, 85 S.Ct. at 1047:

> If respondents in their subsequent commercials attempt to come as close to the line of misrepresentation as the Commission's order permits, they may without specifically intending to do so cross into the area proscribed by this order. However, it does not seem "unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line." *Boyce Motor Lines, Inc. v. United States,* 342 U.S. 337, 340, 72 S.Ct. 329, 96 L.Ed. 367.

Finally, Reader's Digest argues that the Travel Check, which was part of a twelve-page sweepstakes pamphlet, does not have a tendency to deceive. To assess the tendency of the Travel Check to deceive, the Court must consider the advertising as a whole. *Beneficial Corp. v. FTC, supra,* 542 F.2d at 617. Reader's Digest distributed the Travel Check in a pamphlet labeled a "Sweepstakes Passport," which was designed to look like a United States passport.[33] Two

33. Docket Item 37, ex. A.

of the Travel Checks were printed on one side of a single sheet of paper and that page became the center page of the pamphlet. The Travel Checks are complete in themselves and would most likely be the first things to draw the attention of a consumer who quickly perused the pamphlet. Thus, the Court concludes that the tendency of the Travel Check to deceive consumers, at least initially, is not significantly affected by the information provided on the other pages of the pamphlet. In this respect, it is noteworthy that the Commission considered the check included in the administrative complaint deceptive and it too was part of a multi-page mailing.[34]

It is reasonable to presume that some people who would have discarded the pamphlet without even reading it, might have been induced to examine it more closely simply because they were confused as to whether the Travel Check was actually valuable. Still others, although probably a lesser number, may have believed the Travel Checks were valuable even after reading the pamphlet.

In determining whether advertising has a tendency or capacity to deceive the Court must consider the audience to which it is directed. *See Bates v. State Bar of Arizona, supra,* 433 U.S. at 383 n. 37, 97 S.Ct. 2691. In this case, the audience is the general public, which has been defined to include:

> "the ignorant, and unthinking and the credulous, who, in making purchases, do not stop to analyze but too often are governed by appearances and general impressions"

*Beneficial Corp. v. FTC, supra,* 542 F.2d at 618 n. 11 (quoting 1 Callman, Unfair Competition and Trademarks

34. *See* Docket Item 1, ex. B, pp. 4-8.

§ 19.2(a)(1) at 341-44 (1950)); *see Charles of the Ritz Distributors Corp. v. FTC*, 143 F.2d 676, 679 (C.A.2, 1944). In the circumstances of this case, where Reader's Digest has waived its right to contend that items like the check included in the original complaint are not confusingly simulated items of value, the Court concludes that the Travel Check has a sufficient capacity to deceive to be held in violation of the order. There is no basis for concluding that the Travel Check is likely to be significantly less deceptive than the original check.

## III. *THE CASH-CONVERTIBLE BOND*

The Government contends that the Cash-Convertible Bond is a "confusingly simulated item of value" within the meaning of Paragraph II.C(3). The Court agrees for many of the same reasons given in relation to the Travel Check. The Cash-Convertible Bonds, an example of which appears as exhibit 2 in the appendix, have many of the same characteristics as the original check, including: scroll-like borders, an official-looking background and a notation that they are non-negotiable. Also, the three bonds challenged in this action could be interpreted as giving the person in whose name they are registered $100 dollars a month for life, $2,000 a month for a year or $24,000, respectively.[35] In short, the Bonds were made to look like financial instruments.

Reader's Digest points out that there is no such thing as a "cash-convertible" bond. The Court, however, takes judicial notice of the generally known fact that "convertible bonds" are a common financial instrument. F.R.Evid. 201. Furthermore, the Court considers it unlikely that the majority of the general public, much less "the ignorant, and

35. Docket Item 1, ex. E, pp. 11, 13 and 15.

unthinking and the credulous," would appreciate the significance of the distinction between cash-convertible and convertible bonds.

The three Cash-Convertible Bonds were distributed in an envelope which contained three other certificates as well. After examining the Bonds in the context of the entire promotional packet, the Court concludes that they are likely to possess a tendency to deceive comparable to that of the original check; therefore, their use violated Paragraph II.C(3).

## CONCLUSION

Reader's Digest entered into a consent cease and desist order that prohibited it from distributing "simulated checks" or "confusingly simulated item[s] of value." Thereafter, it distributed a "Travel Check" and certain "Cash-Convertible Bonds" in connection with its sweepstakes promotions. The Government contends these items violated the consent order and now seeks assessment of a civil penalty. Contrary to Reader's Digest's position, the Court neither construes the order as requiring proof that the challenged items actually confused consumers nor concludes that the First Amendment mandates such a construction. Finally, because the distribution of both the Travel Check and the Cash-Convertible Bond violated the order, the Government is entitled to partial summary judgment on the issue of liability.[36]

An order will be entered in accordance with this opinion.

**[Appendix omitted]**

---

36. Of course, Reader's Digest may still press its arguments of good faith, laches, estoppel and lack of harm to the public in connection with the penalty phase of this litigation.

## *Appendix D*

UNITED STATES OF AMERICA,
*Plaintiff*,

v.

THE READER'S DIGEST ASSOCIATION, INC.,
*Defendant*.

Civ. A. No. 75-184.

United States District Court,
D. Delaware.

July 2, 1980.

As Amended July 3, 1980

### MEMORANDUM OPINION

LATCHUM, Chief Judge.

This action was brought on July 7, 1975, by the United States of America (the "Government") against Reader's Digest Association, Inc. ("Reader's Digest" or "defendant"), seeking injunctive relief and the recovery of civil penalties pursuant to sections 5(*l*) and 16(a)(1) of the Federal Trade Commission Act (the "Act"), 15 U.S.C. §§ 45(*l*) and 56(a)(1), for alleged violations of a consent order which became final on January 15, 1972.[1] The consent order required Reader's Digest, which regularly uses a promotional device known as a "sweepstake" in its business of selling and distributing magazines, books and other products, to cease and desist from engaging in various practices in connection with any sweepstake or comparable promotional device. Among the practices proscribed was:

1. Docket Item ("D.I.") 1.

"Using or distributing simulated checks, currency, 'new car certificates', or using or distributing any confusingly simulated item of value."[2] The complaint alleged that in 1973 Reader's Digest, in violation of the consent order, mailed to consumers 13,898,521 "Travel Checks"[3] and thereafter mailed to consumers 4,042,000 "Cash-Convertible Bonds" in connection with their promotional sales efforts.

In prior proceedings in this case, the Court granted the Government's motion for partial summary judgment on the liability issue, holding that the distribution by Reader's Digest of the Travel Checks and Cash-Convertible Bonds violated the consent order.[4] *United States v. Reader's Digest Association, Inc.*, 464 F.Supp. 1037, 1055 (D.Del.1978).

Following additional discovery, the Government on October 26, 1979, requested the Court to impose civil penalties in an amount not less than $1,750,000.[5] On May 13, 1980, the Court held an evidentiary hearing on the civil penalty aspects of this case. Now after considering the sufficiency and weight of the testimony,[6] the demeanor of the witnesses, the documentary evidence produced,[7] and the pre-

---

2. D.I. 1, ex. A., par. II.C(3).

3. D.I. 1; Defendant's answers to interrogatories revealed that a total of 13,898,521 Travel Checks were mailed over the period of the following dates: February 26 through March 2, 1973, March 23, April 20 and June 30, 1973; and that a total of 4,042,000 Cash-Convertible Bonds were mailed through two separate mailings on November 1973 and October 1974. D.I. 9, no. 3(b).

4. *See*, D.I. 44 & 45.

5. D.I. 62.

6. D.I. 81.

7. The parties stipulated that in addition to the testimony and exhibits adduced at the evidentiary hearing, other information before the Court in the form of answers to interrogatories, depositions and affidavits could also be considered for determining what penalty, if any, is to be assessed. D.I. 81 (Trial Transcript "T." pp. 5-6).

hearing and post-hearing briefs of the parties,[8] the Court makes the following findings of fact and conclusions of law in accordance with Rule 52(a) of the Federal Rules of Civil Procedure.

In determining the size of civil penalties, the Court must consider a number of factors including: (1) the good or bad faith of the defendant; (2) the injury to the public; (3) the defendant's ability to pay; (4) the desire to eliminate the benefits derived by a violation; and (5) the necessity of vindicating the authority of the Federal Trade Commission ("FTC"). *United States v. Papercraft Corp.*, 540 F.2d 131, 141 (C.A.3, 1976); *United States v. J. B. Williams Company, Inc.*, 498 F.2d 414, 438 (C.A.2, 1974); *Federal Trade Commission v. Consolidated Foods Corp.*, 396 F.Supp. 1353, 1356-57 (S.D.N.Y.1975); *United States v. Swingline*, 371 F.Supp. 37, 46 (E.D.N.Y. 1974).

First, Reader's Digest contends that the Government seeks a penalty which exceeds the maximum penalty allowed by statute. This contention is based on the following two arguments: (1) since there were only six mass promotional mailings of Travel Checks and Cash Convertible Bonds in 1973 and 1974,[9] there were only six violations of the consent order and (2) because five of the six mass mailings occurred at a time when the relevant statute provided for a $5,000 penalty per violation and only one mass mailing occurred when the amended statute provided for a $10,000

8. D.I. 62, 64, 66, 68, 82 & 83.

9. Four mass mailings of the Travel Checks were made in the last week of February 1973, March 23, April 20 and June 30, 1973. Two mass mailings of the Cash Convertible Bonds were made on November 11, 1973, and in October 1974. D.I. 9, Ans. to Int. 3(b).

penalty per violation,[10] the maximum penalty allowable in this case is $35,000.

The Government, on the other hand, contends that each individual mailing of a Travel Check or Cash Convertible Bond to an addressee constituted a separate violation of the consent order and therefore Reader's Digest, having distributed a total of 17,940,521 such items, is guilty of 17,940,521 separate violations of the order. Thus, according to the Government the allowable maximum penalty should be determined by multiplying the number of separate violations by $5000 or $10,000 whichever amount was applicable at the time of the distributions.[11]

A determination of the proper number of violations depends upon the interplay of the penalty provisions of the applicable statute and the language of the consent order.

The statute, 15 U.S.C. § 45(*l*), applicable to violations which occurred prior to November 16, 1973, provided:[12]

---

10. The maximum penalty for a single violation of a cease and desist order was $5,000 prior to November 16, 1973. 52 Stat. 111. After November 16, 1973, however, the maximum penalty provided for a single violation was increased to $10,000. 87 Stat. 591.

11. The record does not indicate the number of Cash Convertible Bonds that were mailed in November 1974, when the maximum allowable penalty was $10,000 rather than $5,000 per violation; however, if a $5,000 penalty were assessed for each of the 17,940,521 separate items that were mailed the total penalty would amount to more than 89 billion dollars.

12. 15 U.S.C. § 45(*l*) as amended on November 16, 1973 applicable to violations which occurred thereafter provides:

> (*l*) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of con-

(1) Any person, partnership, or corporation who violates an order of the Commission to cease and desist after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the Commission each day of continuance of such failure or neglect shall be deemed a separate offense.

The consent order reads in pertinent part as follows:

* * * * * *

IT IS ORDERED that Reader's Digest Association, Inc., a corporation, and its officers, agents, representatives and employees, directly or through any corporate or other device, in connection with the publication, advertising, offering for sale, sale, or distribution of magazines, books, or other products in commerce as "commerce" is defined in the Federal Trade Commission Act, cease and desist from:

* * * * * *

C. (3) Using or distributing simulated checks, currency, "new car certificates;" or using or distributing any confusingly simulated item of value.

It is quite clear that the Act provides that *each violation* of a cease and desist order is a *separate offense*. The lan-

---

tinuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

guage of the consent order is equally clear in prohibiting Reader's Digest from "distributing *any* confusingly simulated *item* of value." (Emphasis added). Thus, if Reader's Digest had distributed only a single Travel Check or Cash Convertible Bond in its promotional material, there plainly would have been a violation of the precise language of the order. The fact that Reader's Digest distributed millions of the proscribed items rather than just one does not lessen or reduce the seriousness of each individual violative distribution. Hence, the Court concludes that each individual distribution of a Travel Check or Cash Convertible Bond constituted a distinct and separate violation of the order, and since the evidence shows that 17,940,521 of the proscribed items were distributed by mail, there were that many separate violations.

This conclusion, based on the unequivocal language of the statute and consent order, also finds support in prior court decisions. In *United States v. Wilson Chemical Co., Inc.*, 1962 CCH Trade Cases ¶ 70,478 (W.D. Pa.1962), *aff'd*, 319 F.2d 133 (C.A.3, 1963), the district court found that defendants' violative advertisements appeared in approximately 25 million comic books. However, the Government grouped the violations into nine categories depending upon the publisher and the month of publication and sought civil penalties based only on that basis. The court imposed the maximum penalty upon each of the nine categories of violations but noted in dicta "that each publication in each comic book, as shown by the evidence, is a separate and distinct violation."

Likewise, the court in *United States v. Golden Fifty Pharmaceutical Co., Inc.*, 421 F.Supp. 1199 (N.D.Ill.1976), spoke directly to the number of violations that could be

charged in the case of mass mailings. In that action, the Government, having charged the defendants with fourteen mass mailings of the proscribed material in Count I and with two individual mailings in Count III, maintained that the defendants were liable for sixteen violations. The court agreed stating at 421 F.Supp. at 1207:

> Earlier cases offer little concrete guidance on the appropriate number of violations to be charged when an advertisement is disseminated through a mass mailing. Generally, the courts have accepted the FTC's breakdown with little comment. *E.g., J. B. Williams, supra,* 498 F.2d at 420-421; *United States v. Ancorp National Services, Inc.,* 367 F.Supp. 1221 (S.D.N.Y. 1973); *aff'd,* 516 F.2d 198 (2d Cir. 1975). A plausible explanation for the dearth of authority is that the FTC's estimates have been reasonable, if not conservative. For example, in *United States v. Wilson Chemical Co., Inc.,* 1962 CCH Trade Cases ¶ 70,478 (W.D.Pa.1962), *aff'd,* 319 F.2d 133 (3d Cir. 1963) (mem.), the court found that defendants' advertisement appeared in approximately 25,000,000 comic books. The Government, however, grouped the violations into nine categories depending upon the publisher and the month of publication. The court imposed the maximum penalty upon each of the nine violations, noting in dicta that each individual comic book which reached a customer could be considered a separate violation.
>
> Without straining, we could read the statute and order here to similar effect. The statute provides that *each violation* of a cease and desist order is a separate offense. The order prohibits defendants from mailing or causing to be mailed *any advertisement* which con-

tains a proscribed representation. If defendants had mailed a single advertisement in Count I, we would have little trouble finding a violation. The fact that they mailed millions rather than one or two, as in Count III, does not diminish the seriousness of each individual violation. The Government's charitable grouping of the violations in Count I by date and mailing service is more than reasonable.

Accordingly, we find that the proper number of violations attributable to the conduct charged in Count I is fourteen. Moreover, each of the two individual violations alleged in Count III is properly chargeable as a separate violation of the cease and desist order.

Thus, while it is true that in any given case the Government may choose to limit the number of violations for which penalties are sought, it is clearly not required to do so by either the applicable statute or any regulation. In the present case, therefore, there is nothing which prevents the Government from seeking to impose a penalty for each separate violation or which prevents this Court from imposing a separate penalty for each individual distribution of the proscribed items.

Reader's Digest's second contention is that the penalty proposed by the Government is excessive because Reader's Digest acted in the utmost good faith when it distributed the offending material. For example, Reader's Digest contends that once it determined that the FTC believed the Travel Check promotion to be violative of the order, it voluntarily ceased to distribute the simulated checks. The evidence, however, indicates the opposite. When Reader's Digest was advised by letters on April 13, 1973,[13] and again

13. PX 1; D.I. 81, T.39.

on April 25, 1973,[14] that the FTC was of the opinion that the Travel Checks then being distributed violated Part II C.(3) of the cease and desist order, Reader's Digest did not stop distributing that item. Instead it responded in letters[15] dated April 19, May 1 and May 7, 1973, and in a conference[16] with the FTC's attorneys on May 2, 1973, by endlessly arguing that the promotional Travel Check did not violate the consent order. In the May 7, 1973 letter, however, Reader's Digest did state that it would not distribute any more such checks after June 30, 1973, when the then current promotional program would cease.[17] Thus, Reader's Digest failed and refused to discontinue the distribution of Travel Checks until after it had mailed more than thirteen million checks and had completed its then scheduled current distribution program, even though more than two months before it had been advised of the FTC's opinion that the Travel Checks violated the consent order.[18] It seems clear, therefore, that the FTC's letters stating that the Travel Checks were "violative of the order" were never taken seriously by Reader's Digest.[19] That type of conduct and attitude does not reflect a good faith effort to comply with the order.

Reader's Digest contends, however, that its attitude and conduct were reasonable in view of the fact that the consent order was ambiguous and confusing. The Court is unable to accept that argument for several reasons.

---

14. PX 2; D.I. 81, T.40-41.

15. DX 2, 3 & 4.

16. D.I. 81, T.24, 25-26, 42, 44.

17. DX 4, p. 6; DX 81, T.32, 49.

18. Reader's Digest distributed 4,780,000 Travel Checks, more than a third of the entire Travel Checks promotion, between the time it received the FTC's April 13, 1973 letter and June 30, 1973. D.I. 81, T.49-51.

19. D.I. 81, T.51.

In the first place, the evidence shows that the exact language of the consent order involved in this action was language that was suggested by Reader's Digest. The pertinent language of the consent order originally proposed by FTC read as follows:

> Using or distributing simulated checks, currency or other negotiable instruments; and using or distributing simulated new car certificates or any other items of value.

However, during the consent order negotiations which followed, the above prohibitive language was revised at Reader's Digest's suggestion to read precisely as now contained in Part II C.(3) of the consent order which is involved in this case.[20] Thus, Reader's Digest's claim that it was confused as to the scope of the order therefore must not be taken at face value.

Reader's Digest's contention that the consent order was ambiguous and confusing is also highly suspect for another reason. The evidence shows that shortly after the consent order was executed on July 1, 1971,[21] one of Reader's Digest's in-house counsel,[22] who had formerly been an attorney with the FTC, prepared "a memorandum in laymen's terms" as a guide to the intricacies of the consent order for use by product managers, copywriters and new employees of Reader's Digest.[23] That memorandum at page 7 stated:

> (4) RDA may not use "simulated checks, currency, new car certificates"; or distribute any confus-

---

20. D.I. 38, Ex. B, pp. 1-2.
21. D.I. 1, Ex. C.
22. D.I. 81, T.10-11.
23. Id., T.13; DX 1.

> ingly simulated items of value. This FTC Order appears to be an absolute ban on the use of *checks in any form*. It also calls for careful scrutiny of *any "bonds", "traveler's checks"*, or other copies of negotiable instruments.

DX 1, p. 7 (emphasis added). Thus, it is clear that as early as 1971 Reader's Digest's counsel was aware and so advised other employees that the use of promotional sweepstake items, referred to as checks, travel checks and bonds, appeared to be absolutely banned or at least presumptively barred under the terms of the consent order.

Finally, even if the Court were willing to assume that Reader's Digest was confused as to the scope of the order, it would still conclude that Reader's Digest had not acted in good faith because the company made no attempt to obtain a prior opinion from the FTC as to whether its use of the Travel Check would violate the order.[24] This failure is significant because Reader's Digest clearly could have obtained such an opinion from the FTC pursuant to a provision in the FTC's Rules of Practice. That provision provides, in pertinent part, that:

> [a]ny respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order.[25]

The Supreme Court has read that provision as *obligating* the FTC "to give . . . *definitive advice* as to whether [a] proposed action, if pursued, would constitute compliance with the order." *FTC v. Colgate-Palmolive Co.*, 380 U.S.

---

24. D.I. 81, T.51-52.

25. The quoted provision has been included in the FTC's Rules of Practice since at least 1964. *See* 16 C.F.R. § 3.26(b) (1964 Supp.).

374, 394, 85 S.Ct. 1035, 1048, 13 L.Ed.2d 904 (1965) (emphasis added). Since Reader's Digest failed to utilize this available administrative process it is hardly in a position to justify its behavior by pointing to the ambiguous nature of the order.

Reader's Digest also advances the argument that "it made a good faith determination that the 'Travel Check' and 'Cash Convertible Bond' were not likely to confuse or deceive consumers"[26] and that it "made a good faith determination that the [order] only prohibited dissemination of promotional items which would be likely to deceive consumers . . . ."[27]

This, however, is an improper standard for monitoring compliance with an FTC order. To determine whether a promotional item violates an FTC order, the correct standard is not whether the promotional items are deceptive, but rather whether their use conflicts with the terms and spirit of the order. The language of Part II C.(3) of the consent order does not prohibit mailing deceptive promotional materials, it proscribes the distribution of certain *types* of items which the FTC has already determined were deceptive. Part II C.(3) does not use the word "deceptive"; rather, it uses the term "confusingly simulated item of value." Thus, Reader's Digest should have evaluated whether the Travel Check or Cash Convertible Bond were each a "confusingly simulated item of value."

The "deceptive" standard may be properly used by an entity only when no order on the subject is outstanding. By entering into the consent judgment in question, Reader's Digest's appropriate compliance standard became: do these promotional items violate the terms or fall within the

---

26. D.I. 64, p. 26.

27. *Id.*, pp. 28-29.

scope of the consent order? If they appeared to come within the terms of the order, it was obliged not to distribute them, even if it believed them not to be deceptive. Thus, good faith in the context of this proceeding is to be determined not by whether Reader's Digest believed that the Travel Check and Cash Convertible Bond were not deceptive, but rather by whether Reader's Digest attempted honestly to comply with the terms of the consent order.

There is additional evidence which has relevance to Reader's Digest's lack of good faith compliance with the consent order. In October 1979, Miss Megan R. Golden received a promotional package from Reader's Digest,[28] some eleven months after this Court filed its opinion on the liability issue in this action. Through the window of the envelope in which the promotional material was enclosed, one could view the typed addressee's name and address. Just below the address to the left side appeared the printed words: "Grand Prize Winner, Pay To The Order Of" and below that was the typed name Megan R. Golden. On the right side of the window, one can see the printed words "Amount of Check" and below that the typed figure "$50,000.00." Thus, despite the decision of this Court in November 1978, Reader's Digest appears to be continuing to distribute confusingly simulated items of value. This behavior along with its past conduct negates any claim of good faith compliance with the consent order.

This Court also finds that the contention of Reader's Digest that the Government acquiesced in its violative conduct is wholly without merit. As previously noted, the FTC's staff advised Reader's Digest that distribution of the Travel Check was considered to be a violation of the consent order, yet Reader's Digest continued with its then

28. PX 3; D.I. 81, T.3-4; T.55-59, 66.

current promotion through June 30, 1973. With respect to the Cash Convertible Bond promotion, Reader's Digest states that the first time the FTC complained about this item was when this suit was commenced in 1975. However, Reader's Digest never submitted the Cash Convertible Bond to the FTC for review and insofar as the record in this case is concerned, it appears that the FTC had no independent way of knowing about that promotion when it was conducted. Finally, the delay between the dates when the violations occurred and the filing of this suit creates no inference that the FTC approved such activities.

Turning now to a consideration of the public injury factor, Reader's Digest argues there is not a scintilla of evidence to suggest that a single person was confused or deceived by either the Travel Check or Cash Convertible Bond.[29] Indeed, Reader's Digest points out that the Government does not contend that *any* "particular person or persons" was "deceived or confused" either by the Travel Check, the Cash Convertible Bond or by the entire promotional mailings of which these items were a part.[30] Again Reader's Digest misses the point in replaying this argument as it did in the liability part of this action. As the Court pointed out in its earlier opinion, the FTC issued an administrative complaint "reflecting its belief that certain practices were deceptive or confusing" and then entered into a consent order which required Reader's Digest to cease and desist from employing those or similar practices. 464 F.Supp. 1046-47. This Court later concluded:

> By entering into the consent order, [Reader's Digest] relinquished its right to contend that the items mentioned in the original complaint were not deceptive and in violation of section 5 of the Act.

---

29. D.I. 64, p. 32.

30. D.I. 18, Ans. to Int. nos. 10 & 15 at pp. 18, 20-21.

464 F.Supp. at 1049. This Court further found that the Travel Check and the Cash Convertible Bond had "a sufficient capacity to deceive to be held in violation of the order." 464 F.Supp. at 1055. Thus, based on this Court's earlier opinion as the law of the case, Reader's Digest may not now contend that the promotional items in question did not have the capacity to confuse and deceive the public.

The principal purpose of a cease and desist order is to prevent material having a capacity to confuse and deceive from reaching the public. 464 F.Supp. at 1046. Thus, whenever such promotional items reach the public, that *in and of itself* causes harm and injury. The Government need not adduce proof of specific injuries in a penalty assessment proceeding because "[i]t is reasonable to presume that some people who would have discarded the pamphlet without even reading it, might have been induced to examine it more closely simply because they were confused as to whether the Travel Check was actually valuable. Still others, although probably a lesser number, may have believed the Travel Checks were valuable even after reading the pamphlet." 464 F.Supp. at 1054.

Reader's Digest presented testimony by a Vice President of Reader's Digest[31] and an expert witness[32] aimed at proving the proposition that the percentage of individuals who received the promotional material containing the Travel Check and Cash Convertible Bond and who ordered magazine subscriptions was no greater than the percentage of individuals ordering subscriptions from other sweepstakes promotional material which did not contain the two violative items. Hence, Reader's Digest would have the Court draw the conclusion that the Travel Check and Cash Con-

---

31. D.I. 81, T.69-129.

32. *Id.*, T.129-155.

vertible Bond had no impact whatever on Reader's Digest revenues and that it did not obtain unusual benefits from the distribution of these two items. The Court gives little credence or weight to this testimony for the purposes for which it was introduced. First, the Court finds the charts[33] introduced comparing the results of the violative promotions with the non-violative promotions are entitled to very little weight and the same is true with respect to the evidence adduced by the expert witness who based his testimony on those charts.[34] This is so because the testimony clearly showed that the results of a particular promotion is [sic] affected by various factors, such as the time of the year of the promotion,[35] the literacy of the recipients,[36] the prizes or gifts offered,[37] the subscription price of the magazine,[38] and numerous other criteria.[39] The evidence also indicated that the charts did not reflect any analysis of the mailing lists used in the promotions compared and that the mailing lists used to distribute the promotions varied with each promotion.[40] This testimony clearly indicated that the positive responses received in the compared promotions could vary considerably because of different factors which applied to each promotion other than just the type of promotion. Thus, the chart and the expert testimony which relied upon the chart do not lead to the conclusion suggested by Reader's Digest that the violative promotions had no impact whatever upon Reader's Digest revenues.

---

33. DX 7 & 7A.
34. D.I. 81, T.129-155, 135; DX 8.
35. D.I. 81, T.103, 104.
36. *Id.*, T.101, 104.
37. *Id.*, T.101, 103 & 104.
38. *Id.*, T.103.
39. *Id.*, T.103-104, 135.
40. *Id.*, T.106-107.

Nevertheless, despite the built-in distortions of the comparisons shown on the chart, the evidence did reveal that the Travel Check promotions were among the top three of those compared in receiving positive subscription responses.[41] Reader's Digest's expert stated that the Travel Check promotions were not the best nor worst but held about middle ground in receipt of positive responses.[42] Accepting the conclusion that Reader's Digest did not obtain any *unusual* benefits from the distribution of these items is entirely beside the point. The evidence indicates that it received substantial benefits from the violative distributions. For example, it appears that the gross subscription revenue received by Reader's Digest on the Travel Check promotion was greater than 2.7 million dollars[43] and that the gross subscription revenue received on the Cash Convertible Bond promotion probably exceeded 2.5 million dollars.[44] Thus, the Court concludes that Reader's Digest's violative promotions resulted in a substantial benefit to Reader's Digest.

Turning now to Reader's Digest's ability to pay any civil penalty assessed, the Court finds that Reader's Digest's total assets as of December 31, 1978, amounted to more than $325,000,000, that its retained earnings exceeded $70,000,000, that its after tax mean net profits for the calendar years 1976, 1977 and 1978 exceeded $37,000,000,

---

41. D.I. 81, T.106.

42. *Id.*, T.146; similar comparative figures were not available for the Cash Convertible Bonds. *Id.*, T.145.

43. DX 7.

44. DX 7A; because the record does not make a breakdown of the magazines subscribed to at different subscription prices, an exact figure cannot be determined.

and that its mean gross revenues from all sources for the calendar years 1976, 1977 and 1978 exceeded $475,000,000.[45] There seems little doubt that Reader's Digest is able to pay a substantial civil penalty. After all, Reader's Digest was quite willing to put more than $1.4 million at risk on postage[46] alone to distribute the violative material. It is unlikely that amount would have been expended as a matter of business judgment had not a benefit been expected and received.

Finally, the Court finds that a civil penalty of $1,750,000, the minimum suggested by the Government, is entirely reasonable under all the circumstances of this case. While this amount may seem large, it amounts to no more than 10 cents per violation and only 2 cents more than Reader's Digest expended for postage in the violative mailings. While this penalty is not insignificant, it is no more than a moderate one when compared to Reader's Digest's financial resources. A civil penalty should be more than a mere "license fee" or "an acceptable cost of violation" of an order and should provide a "meaningful deterrence." *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 232-33, 95 S.Ct. 926, 932, 43 L.Ed.2d 148 (1975). The civil penalty here imposed measured against all the reasonable criteria considered should act as a deterrent without being overly punitive and is necessary under the circumstances above described in order to vindicate the authority of the FTC. *FTC v. Consolidated Foods Corp., supra* at 1357.

In addition to civil penalties, the Government has requested an injunction against future violations of the

---

45. D.I. 59.

46. D.I. 51, Objection/Answer to Int. no. 7; the record does not reveal the other costs of such promotion.

consent order. Section 5(*l*) of the Act, 15 U.S.C. § 45(*l*), provides:

> The United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of [a] final orde[r] of the Commission.

The Court will grant the injunctive relief requested because it is convinced that this additional remedy should be afforded the Government in order to further assure that Reader's Digest will abide by the provisions of the order to which it agreed in 1971.

Plaintiff is directed to file a proposed final judgment and decree consistent with this memorandum opinion within fifteen (15) days from this date.

## *Appendix E*

### FEDERAL TRADE COMMISSION ACT

Section 5 (15 U.S.C. § 45):

"(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

"(2) The Commission is empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act [of] 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

"(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good

cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by sections 41 to 46 and 47 to 58 of this title, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

"(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pedente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Com-

mission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 347 of Title 28.

"(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

"(e) Such proceedings in the court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

"(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process

mailed by registered mail or by certified mail as aforesaid shall be proof of the service of the same.

"(g) An order of the Commission to cease and desist shall become final—

"(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

"(2) Upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed, or the petition for review dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

"(3) Upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review dismissed by the court of appeals; or

"(4) Upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the Commission be affirmed or the petition for review dismissed.

"(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(i) If the order of the Commission is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired

and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

"(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

"(k) As used in this section the term 'mandate', in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

"(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than $10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day

of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

"(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(B) If the Commission determines in a proceeding under subsection (b) of this section that any act or practice is unfair or deceptive, and issues a final cease and desist order with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

> "(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and
>
> "(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than $10,000 for each violation.

"(C) In the case of a violation through continuing failure to comply with a rule or with subsection (a)(1) of this section, each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

"(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo.

"(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court."

Section 16 (15 U.S.C. § 56):

"(a)(1) Except as otherwise provided in paragraph (2) or (3), if—

"(A) before commencing, defending, or intervening in, any civil action involving this chapter (including an action to collect a civil penalty) which the Commission, or the Attorney General on behalf of the Commission, is authorized to commence, defend, or intervene in, the Commission gives written notification and undertakes to consult with the Attorney General with respect to such action; and

"(B) the Attorney General fails within 45 days after receipt of such notification to commence, defend, or intervene in, such action;

the Commission may commence, defend, or intervene in, and supervise the litigation of, such action and any

appeal of such action in its own name by any of its attorneys designated by it for such purpose.

"(2) Except as otherwise provided in paragraph (3), in any civil action—

"(A) under section 53 of this title (relating to injunctive relief);

"(B) under section 57b of this title (relating to consumer redress);

"(C) to obtain judicial review of a rule prescribed by the Commission, or a cease and desist order issued under section 45 of this title; or

"(D) under the second paragraph of section 49 of this title (relating to enforcement of a subpena [sic]) and under the fourth paragraph of such section (relating to compliance with section 46 of this title);

the Commission shall have exclusive authority to commence or defend, and supervise the litigation of, such action and any appeal of such action in its own name by any of its attorneys designated by it for such purpose, unless the Commission authorizes the Attorney General to do so. The Commission shall inform the Attorney General of the exercise of such authority and such exercise shall not preclude the Attorney General from intervening on behalf of the United States in such action and any appeal of such action as may be otherwise provided by law.

"(3)(A) If the Commission makes a written request to the Attorney General, within the 10-day period which begins on the date of the entry of the judgment in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), to represent itself through any of its attorneys designated by it for such purpose before the Supreme Court in such action, it may do so, if—

"(i) the Attorney General concurs with such request; or

"(ii) the Attorney General, within the 60-day period which begins on the date of the entry of such judgment—

"(a) refuses to appeal or file a petition for writ of certiorari with respect to such civil action, in which case he shall give written notification to the Commission of the reaons for such refusal within such 60-day period; or

"(b) the Attorney General fails to take any action with respect to the Commission's request.

"(B) In any case where the Attorney General represents the Commission before the Supreme Court in any civil action in which the Commission represented itself pursuant to paragraph (1) or (2), the Attorney General may not agree to any settlement, compromise, or dismissal of such action, or confess error in the Supreme Court with respect to such action, unless the Commission concurs.

"(C) For purposes of this paragraph (with respect to representation before the Supreme Court), the term 'Attorney General' includes the Solicitor General.

"(4) If, prior to the expiration of the 45-day period specified in paragraph (1) of this section or a 60-day period specified in paragraph (3), any right of the Commission to commence, defend, or intervene in, any such action or appeal may be extinguished due to any procedural requirement of any court with respect to the time in which any pleadings, notice of appeal, or other acts pertaining to such action or appeal may be taken, the Attorney General shall have one-half of the time required to comply with any such procedural requirement of the court (including any extension of such time granted by the court) for the purpose of comencing, defending, or intervening in the civil action pursuant to paragraph (1) or for the purpose of refusing to appeal or file a petition for writ of certiorari

and the written notification or failing to take any action pursuant to paragraph 3(A)(ii).

"(5) The provisions of this subsection shall apply notwithstanding chapter 31 of Title 28, or any other provision of law.

"(b) Whenever the Commission has reason to believe that any person, partnership, or corporation is liable for a criminal penalty under this chapter, the Commission shall certify the facts to the Attorney General, whose duty it shall be to cause appropriate criminal proceedings to be brought."

# Opposition

Office - Supreme Court, U.S.
FILED
DEC 18 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-772

# In the Supreme Court of the United States

OCTOBER TERM, 1981

THE READER'S DIGEST ASSOCIATION, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

WILLIAM F. BAXTER
*Assistant Attorney General*

BARRY GROSSMAN
ROBERT B. NICHOLSON
SUSAN J. ATKINSON
*Attorneys*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

JOHN H. CARLEY
*General Counsel*

WILLIAM S. SANGER
*Assistant Director for Compliance*

TERRENCE J. BOYLE
*Attorney*

*Federal Trade Commission*
*Washington, D.C. 20580*

## QUESTIONS PRESENTED

1. Whether, in a civil penalty action for violation of a Federal Trade Commission cease-and-desist order entered upon consent, the district court may enter summary judgment against the defendant based on documentary evidence establishing willful repetition of the proscribed conduct, where petitioner offered no other evidence bearing upon any material question of fact.

2. Whether Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), prohibits a court assessing penalties for violation of a cease-and-desist order, entered upon consent, that proscribes "using or distributing simulated checks, currency, 'new car certificates' or * * * any confusingly simulated item of value" in mail solicitations, from treating every such item mailed as a separate violation of the order.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 9 |
| Conclusion | 22 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Bell* v. *United States*, 349 U.S. 81 | 15 |
| *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, cert. denied, 426 U.S. 911 | 21 |
| *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374 | 8, 20 |
| *FTC* v. *Lukens Steel Co.*, 454 F. Supp. 1182 | 14 |
| *United States* v. *Bestline Products Corp.*, 412 F. Supp. 754 | 14 |
| *United States* v. *Bostic*, 336 F. Supp. 1312, aff'd, 473 F.2d 1388 | 14 |
| *United States* v. *Floersheim*, 1980-2 Trade Cas. (CCH) ¶ 63-368, aff'd, 659 F.2d 1090 | 16-17 |
| *United States* v. *Golden Fifty Pharmaceutical Co.*, 421 F. Supp. 1199 | 13, 17 |
| *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223 | 17, 18, 21 |
| *United States* v. *Mitchell*, 445 U.S. 535 | 14 |
| *United States* v. *Piuma*, 40 F. Supp. 119, aff'd, 126 F.2d 601 | 11, 13, 17 |
| *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, cert. denied, 368 U.S. 821 | 12-13 |
| *United States* v. *J.B. Williams Co.*, 354 F. Supp. 521, aff'd in part and rev'd in part on other grounds, 498 F.2d 414 | 17 |
| *United States* v. *J.B. Williams Co.*, 498 F.2d 414 | 11, 12, 13 |
| *United States* v. *Wilson Chemical Co.*, 1962 Trade Cas. (CCH) ¶ 70,478, aff'd, 319 F.2d 133 | 17 |

Constitution, statutes and regulations: Page

United States Constitution, First Amendment..... 20
Federal Trade Commission Act, 15 U.S.C. 41 *et seq.*:
Section 5, 15 U.S.C. 45 ..... 2, 14
Section 5(a), 15 U.S.C. 45(a) ..... 19
Section 5(c), 15 U.S.C. 45(c) ..... 10
Section 5(g), 15 U.S.C. 45(g) ..... 10, 11
Section 5(*l*), 15 U.S.C. 45(*l*) ..4, 5, 10, 11, 15, 17, 18
Section 16, 15 U.S.C. 56 ..... 11
Section 16(a)(1), 15 U.S.C. 56(a)(1) ..... 4
16 C.F.R. 2.41(d) ..... 20
16 C.F.R. 3.61(d) (1973) ..... 7

Miscellaneous:

96 Cong. Rec. (1950):
p. 2974 ..... 18
p. 3019 ..... 21
p. 3026 ..... 18
*Hearings on S. 3744 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 2d Sess. (1936) ..... 19
S. Rep. No. 93-151, 93d Cong., 1st Sess. (1973).... 18

# In the Supreme Court of the United States

OCTOBER TERM, 1981

---

No. 81-772

THE READER'S DIGEST ASSOCIATION, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-33) has not yet been reported. The district court's opinions (*id.* at C-37 to C-65, D-66 to D-84) are reported at 464 F. Supp. 1037 and 494 F. Supp, 770.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A-34) was entered on August 24, 1981 and rehearing was denied (*id.* at B-35 to B-36) on September 16, 1981. The petition for a writ of certiorari was filed on October 22, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. *a.* The Reader's Digest Sweepstakes is a massive mail solicitation that promises money or merchandise to some proportion of those persons who return the sweepstakes entry forms. In 1971, the Federal Trade Commission filed an administrative complaint (J.A. 18-32)[1] charging petitioner with violating Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, by committing numerous unfair and deceptive practices that had "the capacity and tendency to mislead" the public (J.A. 31) in connection with the sweepstakes. The practices alleged ranged from persistent misrepresentation of the number and value of prizes to be awarded, to undisclosed obstacles placed in the way of collection of the major prizes (J.A. 26-29). The complaint alleged that petitioner had falsely represented that "[s]imulated checks, 'money' and other negotiable instruments and simulated 'New Car Certificates'" were "valuable and [could] be cashed, redeemed, or exchanged for United States currency or for a new car," when in fact the documents were not valuable, and could not be cashed, redeemed, or exchanged for currency or a new car (Pet. App. A-3; J.A. 27, 30). The complaint included copies of some "[t]ypical and illustrative" (J.A. 20) promotional materials, including a simulated check purporting to award "$100 dollars a month for life" and a "New Car Certificate" for a 1970 Ford Mustang (see Pet. App. A-30; J.A. 23, 25).

Petitioner and the Commission settled the administrative case by consent order in 1971 (Pet. App.

---

[1] "J.A." refers to the joint appendix filed in the court of appeals.

A-2). Petitioner agreed to cease its use of various practices, including "[u]sing or distributing simulated checks, currency, 'new car certificates'; or using or distributing any confusingly simulated item of value" (Pet. App. A-3; J.A. 38). The parties further agreed that the consent order was to be construed in light of the administrative complaint (Pet. App. A-2; J.A. 34).

*b.* In early 1973, petitioner began a "Sweepstakes Passport" promotion. As part of the promotion it mailed millions of "travel checks" which purported to pay a grand prize winner "one hundred dollars a month for life" (Pet. App. A-3, A-31).

On April 13, 1973, a Commission staff attorney informed petitioner that the travel checks were "clearly violative" of the portion of the 1971 consent order prohibiting the dissemination of simulated checks or confusingly simulated items of value (Pet. App. A-3; J.A. 728). Commission attorneys then met with petitioner's counsel to explain the agency staff's conclusion. On May 7, 1973, petitioner's counsel informed the FTC that petitioner would discontinue using the travel checks after June 30, 1973 (Pet. App. A-3; J.A. 763-764). Petitioner then proceeded to complete its mailing of the "Sweepstakes Passport" promotion, sending out over four million more travel checks between May 7, and June 30, 1973 (Pet. App. A-4).

In September and November 1974, petitioner distributed approximately two million "cash-convertible bonds" as part of yet another sweepstakes campaign (Pet. App. A-4). Petitioner enclosed three different bonds in each packet mailed, one purporting to award a winner "one hundred dollars a month for life," a

second "$2,000.00 a month for a year," and a third the lump sum of $24,000 (*id.* at A-32; J.A. 58, 60, 62).

In July 1975, the United States filed a complaint pursuant to Sections 5(*l*) and 16(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*) and 56(a)(1), in the United States District Court for the District of Delaware seeking penalties for violations of the cease and desist order, as well as injunctive relief (J.A. 7-10). The complaint charged that petitioner had violated the consent order by distributing several million "simulated checks," and several million other "confusingly simulated items of value." The United States sought judgment "for each and every violation of the cease and desist order, as authorized by law" (J.A. 8, 9).

2. Petitioner did not request a jury trial and, following discovery, moved for summary judgment (J.A. 445). The United States moved for summary judgment on liability (J.A. 81). The district court granted the government's motion (Pet. App. C-37 to C-65). Reading the consent decree in conjunction with the administrative complaint, the district court concluded that the parties had intended that the prohibitory phrase "any "confusingly simulated item of value" embrace any item similar to those mentioned in the complaint which "on its face, could be said to have the same capacity or tendency to mislead consumers" (*id.* at C-47). The court accordingly rejected petitioner's contention that the United States was required to prove that the contested checks and bonds had actually caused confusion (*ibid.*). Upon comparison of the "travel checks" and "cash-convertible bonds" distributed by petitioner in 1973 and 1974 with the sample documents that had been attached to the administrative

complaint and the consent order, the court concluded that the former were sufficiently similar to the latter to violate the order (*id.* at C-59 to C-64). The court noted that "[s]everal striking similarities between the Travel Check and the original check make the conclusion that the former is confusingly simulated almost inescapable" (*id.* at C-60). The court also found that the cash-convertible bonds "have many of the same characteristics as the original check" and noted that they were captioned deceptively like convertible bonds, a common form of financial instrument (*id.* at C-64 to C-65).

3. Following further discovery, the district court conducted an evidentiary hearing and assessed penalties. In a separate opinion directed to the question of remedies (Pet. App. D-66 to D-84), the court noted (*id.* at D-70) that Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), provides that "[e]ach separate violation of * * * [a cease and desist] order shall be a separate offense * * *." Because the consent order entered into by petitioner and the FTC prohibited petitioner from "distributing *any* confusingly simulated item of value" (J.A. 38; emphasis added), the district court concluded that "each individual distribution of a Travel Check or Cash Convertible Bond constituted a distinct and separate violation of the order" (Pet. App. D-71). Since petitioner had distributed 17,940,521 of the proscribed items, the court found an equal number of violations of the order (*id.* at D-69). The district court found that petitioner's violations were in bad faith, because it knew that the travel checks and cash-convertible bonds violated the order and had been warned by the Commission staff, and yet proceeded to distribute them (Pet. App. D-73 to D-79). The court also determined that

petitioner had benefitted substantially from its illegal promotions by obtaining $5.2 million in subscription revenue (*id.* at D-82 to D-83). Penalties were assessed in the amount of $1,750,000.[2]

4. The court of appeals affirmed (Pet. App. A-1 to A-33). In its view the liability issue encompassed two questions: (1) what kinds of materials were prohibited by the order; (2) whether the materials at issue were of the prohibited type (Pet. App. A-7). With respect to the former question, the court of appeals agreed with the district court that the order "does not require the Government to prove that the challenged material deceived or confused consumers" (*id.* at A-10). Rather, it held that "[t]he phrase 'confusingly simulated item of value' was * * * intended to apply to promotional material that was similar to the items reproduced in the administrative complaint, and on its face, could be said to have the same capacity or tendency to mislead consumers" (*id.* at A-10 to A-11). As to the latter issue, the court agreed that the materials at issue in fact were prohibited by the order. Like the district court, it found that the similarities between the checks and bonds included in the 1971 Commission complaint and those mailed in 1973 and 1974 were "striking" (*id.* at A-15, A-16). In rejecting petitioner's argument that it had been improperly denied a hearing on disputed facts relevant to this issue, the court pointed out that Reader's Digest itself had moved for summary judgment on liability (*id.* at A-11 n.6). The court also concluded that the question of violation of the order, which here involved only a com-

[2] The court also issued a permanent injunction to assure that petitioner would obey the consent order in the future (*id.* at D-84).

parison of the original offending documents with other documents that admittedly were disseminated by petitioner, was a question of law (*id.* at A-11 to A-14).[3]

The court of appeals also affirmed the district court's assessment of a $1.75 million penalty (Pet. App. A-18 to A-26). "Juxtaposing the language of the statute and the order," the court reached "the same conclusion as the district court—the distribution of *any* simulated item of value comprised a separate violation of the order" (*id.* at A-19). The court considered this interpretation to be consistent with existing precedent (*id.* at A-20), and the legislative purpose of deterring and punishing violation of Commission orders. Finally, the court of appeals affirmed the district court's findings that Reader's Digest had violated the order in bad faith,[4] earning large

---

[3] Reader's Digest never requested a jury trial and itself moved for summary judgment on the premise that there were no material issues of disputed fact. Nonetheless, the court expressed concern that, if a jury trial were required to determine violations of an FTC order, courts would be burdened with protracted trials, parties subject to FTC orders would be tempted to distribute material on the borderline of legality, and the effectiveness of FTC orders would be jeopardized by the juries' temptation to decide the irrelevant question of deceptiveness (*id.* at A-14 to A-15).

[4] The court of appeals also noted that petitioner's failure to seek an FTC opinion prior to distributing the travel checks and cash-convertible bonds was further evidence of bad faith (Pet. App. A-24). The applicable FTC rule in 1973 provided, in pertinent part: "[a]ny respondent subject to a Commission order may request advice from the Commission as to whether a proposed course of action, if pursued by it, will constitute compliance with such order." 16 C.F.R. 3.61(d) (1973). The court of appeals noted that this provision has been interpreted by this Court as "obligating the FTC to 'give . . .

profits thereby, and accordingly concluded that the $1.75 million fine was not an abuse of discretion (*id.* at A-22 to A-28).[5]

Judge Sloviter wrote separately (Pet. App. A-33) only to stress her view that the portion of the court's opinion (Pet. App. A-13 to A-15) discussing whether a court or jury should determine whether an order had been violated went "further than necessary under the facts of this case" (*id.* at A-33). She noted that petitioner had never asked for a jury trial, and that the district court accordingly was bound to make all of the determinations in this case, however they might be characterized. She further noted that no relevant facts were in dispute and accordingly concluded that summary judgment was appropriately granted (*id.* at A-33).

The court of appeals denied rehearing and rehearing en banc (Pet. App. B-35 to B-36).[6]

---

definitive advice as to whether [a] proposed action, if pursued, would constitute compliance with the order.' *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965)." Pet. App. A-24; footnote omitted. The court found petitioner's failure to seek prior FTC advice "particularly surprising" in light of petitioner's awareness, evidenced in a memorandum to its employees from its associate general counsel, that the consent order called for " 'careful scrutiny of any 'bonds,' traveler's checks or other copies of negotiable instruments' " (J.A. 751, quoted at Pet. App. A-25).

[5] The court of appeals also affirmed the grant of injunctive relief (Pet. App. A-26 to A-28).

[6] Three judges would have granted rehearing en banc because they believed that Congress did not envision that the statute would be applied to the number of violations found by the district court.

## ARGUMENT

The courts below correctly concluded that summary judgment establishing petitioner's liability for violation of the consent order was appropriate on the record of this case, and that each item disseminated in violation of the consent order constituted a violation thereof. The decision below does not conflict with any decision of this Court or any other court of appeals and further review is unwarranted.

1. Contrary to petitioner's assertion (Pet. 7), this record does not present the question whether defendants charged with violation of cease and desist orders are entitled to an evidentiary hearing to resolve factual disputes. Similarly, there is no occasion to decide whether such charges encompass questions of fact or only of law because, as petitioner acknowledges (*id.* at 8 n.6), it did not seek a jury, and because petitioner proffered no evidence bearing upon any material issue to the court.

*a.* As the court of appeals recognized (Pet. App. A-7), the liability phase of the government's action presented two distinct issues: (1) the intended scope of the prohibitory consent order and (2) whether the items in question fall within the order's proscription (*id.* at A-7). Petitioner now concedes that the first issue presents a question of law to be determined by the court (Pet. 4 n.3, 19), and has not directly challenged the lower courts' interpretation of the cease and desist order. The only material question as to which petitioner asserts the right to an evidentiary hearing is whether the travel check and the cash convertible bonds were so similar to the earlier offending documents as to fall within the consent order's proscription. The facts relevant to this inquiry, however, were not in dispute. Petitioner has

never claimed that any of its proposed proof was germane to the face-to-face comparison (see pages 10-12 & note 10 *infra*). The district court thus had only to compare the travel checks and the cash-convertible bonds with the sample documents attached to the complaint. Petitioner was, of course, afforded a full opportunity to be heard respecting this comparison through briefing and oral argument. The "checks" and "bonds" issued in 1973 and 1974 were so similar that the court of appeals was "compelled" to agree with the district court that the travel check and the bonds clearly fall within the order's prohibition (Pet. App. A-15 to A-16).

Petitioner argues (Pet. 11-14) that the district court was required to consider evidence on the question whether the promotional materials here at issue had the "capacity to deceive."[7] The courts below, however, correctly recognized that that question was not relevant in this civil penalty action. If petitioner had chosen to contest the initial Commission proceeding, the FTC, in order to establish a violation of the Act, would have had to demonstrate that the materials there at issue had the "capacity to deceive" as alleged in the initial complaint. But, in agreeing to a consent order, petitioner waived its right to an administrative hearing to contest the Commission's assertion in the administrative complaint

---

[7] By this petitioner evidently means to renew its contention, properly rejected below (see Pet. App. A-10 to A-11, C-46 to C-47), that actual instances of deception must be proven to sustain a finding that the consent order was violated. But the statutory authority for this civil penalty action, 15 U.S.C. 45(*l*), makes actionable the violation of a Commission order without more. Relitigation of the basis for the underlying order is not permitted. Compare 15 U.S.C. 45(c), (g). See note 8 *infra*.

that its "simulated checks," and other simulated items of value, have a capacity to deceive.[8] It further agreed that the consent order "shall have the same force and effect" as cease and desist orders entered after an adjudicatory hearing (J.A. 34). Thus, it effectively conceded, for purpose of future enforcement of the order, that documents within the scope of the consent order have the capacity to deceive.[9] Therefore, the only question remaining for decision—which was to be resolved by the court since no jury trial had ever been requested—was whether the promo-

---

[8] Petitioner expressly waived "[a]ll rights to seek judicial review or otherwise to challenge or contest the validity of the [consent] order" (J.A. 33-34). Unlike petitioner, the company in *United States* v. *J.B. Williams Co.*, 498 F.2d 414 (2d Cir. 1974), had not agreed to a consent order, so it was afforded an administrative hearing in the cease and desist proceeding to determine whether its television commercials had the capacity to deceive. The present petitioner waived such a hearing when it entered into the consent order. As petitioner concedes (Pet. 14 n.13), once the Commission enters a final cease and desist order, either after a hearing or by consent, the United States can file a civil penalty action for violation of that order without further administrative proceedings. 15 U.S.C. 45(g), (*l*), 56.

[9] Were it otherwise, the Commission would have no incentive to enter into a settlement, because even if petitioner distributed documents identical to the original offending documents, the Commission would have to prove ab initio that the new documents have a capacity to deceive. Thus, if petitioner distributes materials which are essentially similar to the original offending documents, it is presumed that the new materials have the same deceptive capacity as the originals. *United States* v. *J.B. Williams Co.*, *supra*, 498 F.2d at 431; *United States* v. *Piuma*, 40 F. Supp. 119, 123 (S.D. Cal. 1941), aff'd, 126 F.2d 601, 603 (9th Cir. 1942).

tional materials challenged herein were the type proscribed by the consent order. Moreover, as noted above, petitioner never offered any evidence relevant to that comparison.[10] Under the circumstances, judgment was properly entered establishing petitioner's liability.

*b.* Petitioner's contention (Pet. 4, 5, 7-10) that this case requires resolution of a conflict among the circuits is unfounded. To be sure, the majority of the court of appeals panel noted (Pet. App. A-13) disagreement with the Second Circuit's conclusion (see *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 421-430 (1974)) that triable issues concerning whether a cease and desist order has been violated are to be decided by a jury.[11] There is no occasion for

---

[10] Petitioner sought to introduce evidence which it alleged would show that consumers were not misled by the travel checks and the cash-convertible bonds (J.A. 449-450, 833-838). However, the evidence in question was relevant only to the issue of deceptiveness of the documents, the issue which petitioner conceded in entering into the decree. Thus, petitioner failed to offer any evidence in addition to the documents themselves that would have been relevant in determining whether the travel checks and bonds fall within the consent order's prohibition.

[11] In this respect the court of appeals merely adhered to its prior decision in *United States* v. *Vulcanized Rubber & Plastics Co.*, 288 F.2d 257, 258 n.2, cert. denied, 368 U.S. 821 (1961). Petitioner describes (Pet. 11-12) the relevant language in *Vulcanized Rubber & Plastics Co.* as dictum. The panel in this case observed (Pet. App. A-13 n.7), citing *United States* v. *J.B. Williams Co., supra*, 498 F.2d at 450-451 (Oakes, J., dissenting)), "the district court's award of summary judgment in favor of the Government in *Vulcanized Rubber* was affirmed even though the company char-

resolution of that disagreement in this case, however, because, as Judge Sloviter correctly noted (Pet. App. A-33), petitioner never requested a jury trial. Accordingly, however it may be characterized, the determination whether petitioner violated the Commission's order was properly made by the court. And, as is indicated above (pages 9-12), the record of this case does not present the question whether petitioner was entitled to an evidentiary hearing on any material issue.[12]

---

acterized the dispute as factual rather than legal." In any event, as we explain in the text above, the narrow holding of this case is no different from that of *Vulcanized Rubber, supra*, 288 F.2d at 258 n.2 ("Since there was no issue of fact presented, the district court properly disposed of the case on summary judgment").

[12] The actual result below is readily reconcilable with the Second Circuit's decision in *United States* v. *J.B. Williams Co., supra*. Although the Second Circuit concluded that the question whether some of the television advertisements at issue in that case violated a Commission order was for a jury, 498 F.2d at 430-434, it did not suggest that evidence other than the advertisements themselves was to be considered, and it expressly noted that the jury trial issue "would of course be academic if, as the district court held, there were no triable issues of fact." *Id.* at 421 (citation omitted). Indeed, the court upheld the grant of summary judgment establishing liability as to other advertisements the language of which clearly violated the FTC's order. *Id.* at 434. In short, there is nothing in *J.B. Williams* that suggests that the Second Circuit would have decided this case differently than the Third Circuit.

Other decisions noted by petitioner (Pet. 9) likewise do not conflict with the court of appeals' decision in this case. In *Piuma* v. *United States, supra*, 126 F.2d at 603, the court upheld the grant of summary judgment for the government because there were no disputed issues of material fact. In *United States* v. *Golden Fifty Pharmaceutical Co.*, 421 F. Supp. 1199, 1201-1206 (N.D. Ill. 1976), the court granted the government's motion for summary judgment because the

*c.* Petitioner also contends (Pet. 10-14) that the entry of summary judgment establishing its liability deprives it of due process of law. Petitioner did not present this argument to the court of appeals in a timely manner and it was accordingly not addressed by the court of appeals.[13] In these circumstances, it would be inappropriate for this Court to consider the due process argument. *United States* v. *Mitchell*, 445 U.S. 535, 546 n.7 (1980). In any event, petitioner's due process argument rests on the mistaken premise that whether the promotional materials at issue actually misled consumers was a disputed fact material in determining whether the consent order had been violated. See pages 10-12 & note 10 *supra*. Thus petitioner's due process claim presents no separate issue which merits review by this Court.

2. *a.* Petitioner argues (Pet. 14-19) that Section 5 of the Federal Trade Commission Act, 15 U.S.C. 45, does not allow the courts to find a violation of an FTC order for each advertisement distributed in violation of the order. Instead, petitioner contends (Pet. 16), the number of violations may not exceed the number of "bulk mailings" of the material that violates the outstanding Commission

---

evidence that the defendant's advertisements fell within the cease and desist order's prohibition was so clear. In *United States* v. *Bestline Products Corp.*, 412 F. Supp. 754 (N.D. Cal. 1976), the court granted the government's motion for summary judgment as to eight violations of an FTC order and denied the motion as to one alleged violation. In *United States* v. *Bostic*, 336 F. Supp. 1312 (D.S.C. 1971), aff'd, 473 F.2d 1388 (4th Cir. 1972), and *FTC* v. *Lukens Steel Co.*, 454 F. Supp. 1182 (D.D.C. 1978), the government did not move for summary judgment and the cases were decided, for and against the government, respectively, after trial.

[13] Petitioner raised this issue for the first time in its unsuccessful petition for rehearing.

order.[14] Petitioner's contention finds no support in the language of the statute, its legislative history or considerations of public policy and thus properly was rejected by the courts below.

Section 5(*l*) of the Federal Trade Commission Act, 15 U.S.C. 45(*l*), provides that a violator of an FTC cease and desist order shall pay a civil penalty of "not more than $10,000 for each violation." It further provides that "[e]ach separate violation of such an order shall be a separate offense" (*ibid.*). The statute, however, does not define a "separate violation" of an outstanding Commission order. As the courts below recognized (Pet. App. A-19, D-69), one must look to the order itself to answer that question.[15]

The consent order in this case, based as it was on petitioner's prior mass mailings, could have provided expressly that any bulk mailing of similar material would be deemed a single violation of the order. But, it did not.[16] Instead, in entering the consent

---

[14] Petitioner apparently defines a single bulk mailing to include all materials mailed on a given day or consecutive days. It mailed the travel checks and bonds on six different days or groups of days (Pet. App. D-67 n.3; J.A. 567-568).

[15] Petitioner's argument (Pet. 17-18) that Congress must clearly indicate its intention to treat related transactions as separate violations is accordingly inapplicable to this case. Petitioner's reliance (*id.* at 18) upon *Bell* v. *United States*, 349 U.S. 81, 84 (1955), is misplaced, for the result there rests upon the rule of lenity, applicable only to violations of the criminal law. In any event, in the present setting Congress clearly allowed the terms of the consent order to define the violation.

[16] As the district court observed (Pet. App. D-75), the relevant language was redrafted by counsel for petitioner.

order in this case, the Commission and petitioner agreed that distribution of *any* item prohibited by the original order would constitute a separate violation of that order. The order is clear in its prohibition: the defendant is to cease and desist from "using or distributing *any* confusingly simulated item of value" (J.A. 15; emphasis added). As the court of appeals observed (Pet. App. A-19), under the plain and unambiguous terms of the order, "the distribution of *any* simulated item of value comprised a separate violation of the order." There is no reason to believe that the parties did not intend the result that would ensue from a literal reading of the language employed. Petitioner does not deny that the mailing of a single simulated check would violate the order. And petitioner points to no evidence that suggests that the parties agreed to allow it to send out millions of proscribed advertisements for the price of a single violation.

*b.* While petitioner purports to challenge the court of appeals' interpretation of the statute (Pet. 15-18), it ignores the fact that the decision below turns upon the language of the consent order. Accordingly, in order to prevail, petitioner must demonstrate that Congress has precluded enforcement of a Commission order providing that each item disseminated in violation of the order is a separate violation. But, nothing in the statutory language supports this position. Nor has any court ever recognized the implied limitation for which petitioner argues. On the contrary, several courts have indicated that bulk mailings or distributions of items in violation of an FTC order may constitute numerous separate violations of that order.[17]

---

[17] *United States* v. *Floersheim*, 1980-2 Trade Cas. (CCH) ¶ 63-368, at 75,868, 75,872 (C.D. Cal. 1980), aff'd, 659 F.2d

*c.* The court of appeals' decision is consistent with the purpose of the statutory penalty provision, 15 U.S.C. 45(*l*). As this Court held in *United States* v. *ITT Continental Baking Co.*, 420 U.S. 223, 231 (1975), "Congress was concerned with avoiding a situation in which the statutory penalty would be regarded by potential violators of FTC orders as nothing more than acceptable cost of violation, rather

---

1090 (9th Cir. 1981) (distribution of 305,245 banned items constitutes 305,245 violations); *United States* v. *Golden Fifty Pharmaceutical Co., supra*, 421 F. Supp. at 1207; see also, *United States* v. *Wilson Chemical Co.*, 1962 Trade Cas. (CCH) ¶ 70,478, at 76,957-76,958 (W.D. Pa. 1962), aff'd, 319 F.2d 133 (3d Cir. 1963).

Contrary to petitioner's contention (Pet. 16-17) (and the more tentative view expressed by the dissenters from the denial of rehearing en banc (Pet. App. B-36)), the decision in *United States* v. *J.B. Williams Co.*, 354 F. Supp. 521 (S.D.N.J. 1973), aff'd in part and rev'd in part on other grounds, 498 F.2d 414 (2d Cir. 1974), is not inconsistent with the result reached by the court of appeals in this case. J. B. Williams Co. had broadcast 11 offending commercials on 100 separate television programs. The government charged the company with 100 violations of the cease and desist order; the defendant argued that its maximum liability should be limited to 11 violations. The district court held, as did the courts below in this case, that the number of violations depended on the definition of a violation contained in the cease and desist order. The order in *J.B. Williams Co.* provided that the airing of an illegal television advertisement (rather than the reception thereof) would violate the order. 354 F. Supp. at 547. The court did not consider whether the number of violations was instead the number of households (or viewers) which actually viewed the commercial because the government did not ask the court to award penalties on that basis. Similarly, in *Piuma* v. *United States*, 126 F.2d 601, 603 (9th Cir. 1942), the court assessed a penalty based on the maximum number of violations which the government had alleged.

than as a deterrence to violation." [18] In the court of appeals' words "[a]dopting the Digest's position that

---

[18] Although *ITT Continental Baking Co.* dealt with the continuing violation provision of 15 U.S.C. 45(*l*), the court of appeals recognized that this Court's analysis applies with equal force to a civil penalty action for separate violations under the statute. In enacting the continuing violation provision in 1950, Congress clearly contemplated that violators would face potential penalties of millions of dollars. See, *e.g.*, 96 Cong. Rec. 2974, 3026 (1950) (letter from W. T. Kelley, General Counsel, FTC, to Senator Fulbright (Mar. 7, 1950)). There is no basis for subjecting a party that continuously violates an order by maintaining a billboard to potential liability of millions of dollars (as is discussed at 96 Cong. Rec. 2974, 3026 (1950)) while allowing a mass mailing violator such as petitioner to escape with a maximum penalty of only ten thousand dollars.

Petitioner seeks to bolster its contention by quoting out of context a passage from the legislative history of the 1975 amendments to the Act (Pet. 16). The complete text of the relevant passage, however, is inconsistent with petitioner's contention (S. Rep. No. 93-151, 93d Cong., 1st Sess. 27 (1973); emphasis added):

> The civil penalty which can be imposed is $10,000 "for each such violation." *The Commission would have to judge what constituted "each such violation" in the particular case,* but "each such violation" would not *necessarily* be each product unfairly or deceptively sold. The focus, in the opinion of the Committee, should be on the decision-making process of the person against whom the penalty is sought, the number of different decisions he made *and the harm generated by those decisions.*

Thus, Congress contemplated that the Commission would determine, through its orders, what conduct would be deemed a separate violation. In making that determination, the Commission was expected to consider the number of separate decisions to act in violation of its order, but the magnitude of the harm caused was also to be considered.

Petitioner also relies on an item from the legislative history of the 1938 amendment to the Act (Pet. 16 n.15). The

one bulk mailing—no matter how large—comprises only one violation would eviscerate any punitive or deterrent effect of FTC penalty proceedings" (Pet. App. A-21).[19] This consideration is highlighted in the instant case, for the district court found (*id.* at D-82) that petitioner's practices "resulted in a substantial benefit to Reader's Digest." The maximum penalty that could be imposed, in petitioner's view, for mailing an item violating a Commission order to every household in the United States would be $10,000. Unless the courts are authorized to impose

---

passage upon which it relies, however, is taken out of context. In 1938, Congress was considering amending Section 5(a)'s prohibition of "unfair methods of competition" to include "unfair or deceptive acts or practices." See *Hearings on S. 3744 Before the Senate Comm. on Interstate Commerce*, 74th Cong., 2d Sess. 19 (1936). Congress was concerned that use of the term "unfair or deceptive acts or practices" might cause the Commission to base a complaint "upon trivial occurrence" or "upon accidental or unintentional or sporadic, unfair or deceptive practices" (see *id.* at 20). It was in this context that FTC Commissioner Davis stated that a misrepresentation in one issue of a catalogue would be considered a single act "and the determining factor [as to whether that act would be considered to constitute an unfair method of competition] would be whether the misrepresentation was accidental or intentional" (*id.* at 21). Commissioner Davis did not address the separate question of how to count violations of an existing cease and desist order based upon a previously established violation of Section 5(a) of the Federal Trade Commission Act.

[19] Petitioner's construction of the statute would also result in assessment of penalties unrelated in amount to the extent of a violator's culpability. For instance, logistical considerations such as the violator's mail processing capacity and Postal Service schedules might be determinative of the maximum penalty. See note 14 *supra*.

realistic penalties, as provided for by a particular cease and desist order within the maximum limit established by Congress, there will be every incentive to violate the Commission's orders on a massive scale.

Petitioner complains that treating each advertisement as a violation could result in imposition of very large penalties on those who violate the Commission's orders by mass mailings or distribution of publications (Pet. 17, 19).[20] Under the court of appeals' decision, however, the consequences of a violation depend in part upon the terms of the order in question. They may therefore be the subject of negotiations whenever an order is entered upon consent. Thus, a cease and desist order may be framed to meet the special circumstances affecting a particular business. Because the court of appeals' decision quite properly focuses on the terms of the particular order in this case, no question of general applicability is presented by this aspect of the decision in this case.

Congress recognized that very large penalties could be imposed for multiple violations of Commission orders, but was confident that unduly harsh penalties would be avoided through the exercise of

---

[20] The court of appeals rejected petitioner's claim, which is not presented to this Court, that the district court's construction of the consent order as not requiring evidence of actual deception had an unconstitutional chilling effect on its First Amendment right to commercial speech (Pet. App. A-16 to A-18). In any event, as the court of appeals noted (Pet. App. A-24 & n.20), the FTC provides advice upon request on whether proposed conduct is consistent with an outstanding cease and desist order. See 16 C.F.R. 2.41(d); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 394 (1965). Thus, the risks to advertisers occasioned by the decision below that are envisioned by petitioner (Pet. 6, 19) are without foundation.

judicial discretion in imposing penalties of up to $10,000 for each violation. In setting that maximum liability, Congress fully expected that district judges, in the exercise of sound discretion would fix just penalties. 96 Cong. Rec. 3019 (1950) (remarks of Senator George); 96 Cong. Rec. 2974, 3026 (1950) (letter from W.T. Kelley, General Counsel, FTC, to Senator Fulbright (Mar. 7, 1950)). Thus, the court of appeals noted that (Pet. App. A-22) its decision creates potential for large penalties, but correctly recognized that "any penalty actually imposed by a district court would be subject to the limitation of judicial discretion." See *United States* v. *ITT Continental Baking Co., supra*, 420 U.S. at 299 n.6; *Brown & Williamson Tobacco Corp.* v. *Engman*, 527 F.2d 1115, 1120-1121 (2d Cir. 1975), cert. denied, 426 U.S. 911 (1976). In this case, the district court carefully considered the nature of the violations, the setting in which they occurred, the very substantial revenues gained therefrom, and the resources of petitioner. It ultimately imposed a fine that equals roughly ten cents per violation. The court of appeals correctly found (Pet. App. A-26) no abuse of discretion in fixing the penalty and petitioner has not challenged that determination in this Court. Thus, Congress' confidence that the sound judgment of district courts would prevent imposition of unduly harsh penalties was vindicated in this case.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

WILLIAM F. BAXTER
*Assistant Attorney General*

BARRY GROSSMAN
ROBERT B. NICHOLSON
SUSAN J. ATKINSON
*Attorneys*

JOHN H. CARLEY
*General Counsel*

WILLIAM S. SANGER
*Assistant Director for Compliance*

TERRENCE J. BOYLE
*Attorney*
*Federal Trade Commission*

DECEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 359506 736

# Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
DEC 22 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-772

# In the Supreme Court of the United States

OCTOBER TERM 1981

THE READER'S DIGEST ASSOCIATION, INC.,
a corporation,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

## PETITIONER'S REPLY BRIEF

NOBLE K. GREGORY
Counsel of Record
WILLIAM I. EDLUND
CHARLES R. RAGAN
KEVIN M. FONG
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
Telephone: (415) 983-1177
*Counsel for Petitioner*

DAVID OTIS FULLER, JR.
WILLIAM S. BUSKER
200 Park Avenue
New York, N.Y. 10166

PILLSBURY, MADISON & SUTRO
225 Bush Street
Mailing Address P.O. Box 7880
San Francisco, CA 94120
*Of Counsel*

## TABLE OF CONTENTS

Page

I. Congress has not authorized mulitiple $10,000 penalties for each copy of an advertisement distributed in a single mailing. . . . . 1

II. The ruling below not only conflicts with that of the Second Circuit but also denies petitioner due process . . . . . 2

## TABLE OF AUTHORITIES

United States v. J. B. Williams Company, Inc., 498 F.2d 414 . . 3

46 N.Y.U.L.Rev. 507 . . . . . 2

No. 81-772

# In the Supreme Court of the United States

OCTOBER TERM 1981

THE READER'S DIGEST ASSOCIATION, INC.,
a corporation,
*Petitioner,*

vs.

UNITED STATES OF AMERICA,
*Respondent.*

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

## PETITIONER'S REPLY BRIEF

### I. CONGRESS HAS NOT AUTHORIZED MULTIPLE $10,000 PENALTIES FOR EACH COPY OF AN ADVERTISEMENT DISTRIBUTED IN A SINGLE MAILING.

Respondent avoids the crucial question whether Congress authorized penalties of millions of dollars for each publication of a single advertisement. Respondent's arguments about the asserted policies of the FTC Act should have been addressed to

Congress, not to this Court: If Congress intends to assess multiple violation penalties for a single transaction, it must clearly express its will (Pet., pp. 17-19). Congress has done so in other civil and criminal penalty statutes (Pet., pp. 17-19) but has not done so here.[1]

II. THE RULING BELOW NOT ONLY CONFLICTS WITH THAT OF THE SECOND CIRCUIT BUT ALSO DENIES PETITIONER DUE PROCESS.

Contrary to Respondent's assertions (R.Br., p. 14) petitioner had no occasion to raise the due process issue until the Third Circuit held, in conflict with the Second Circuit, that violation of an FTC order presents only issues of law on which

---

[1] As a commentator has observed, "the [FTC] statute is unclear as to what constitutes a separate violation" (46 N.Y.U.L.Rev. 507, 521). Moreover, although it is the statute not the consent decree which is in issue, it is noteworthy that Respondent misreads the decree: it prohibits distribution of "any" confusingly simulated item (Pet., Appx. A-3); it does not provide that "each item" distributed would be a separate violation (R.Br., p. 16).

defendants are never entitled to evidentiary hearings. The district court had assumed that petitioner would be entitled to an evidentiary hearing to resolve disputed factual issues; it relied upon the Second Circuit's Williams decision (Pet., Appx. C-59) and granted summary judgment only because of its erroneous view that no facts were in dispute. Respondent, on appeal, likewise relied upon Williams (Appellee's Br. (3 Cir.) 17) and argued only that the facts were not in dispute.

On the merits of this question, Respondent does not dispute the existence of a conflict between the Circuits; instead it suggests that the Second Circuit might have reached the same result (R.Br., p. 13). The similarity between the alleged violative items and that proscribed in the order, however, is

necessarily an issue of fact. The consent order on its face made evidence of the capacity or lack of capacity to deceive relevant--the order prohibits "confusingly simulated item[s] of value" (Pet., Appx. A-3). Respondent, by arguing that petitioner failed to present evidence that the advertisements were not "the type proscribed by the order" (R.Br., pp. 11-13), concedes that the Third Circuit's reasoning was erroneous.

The point is that the Third Circuit held that both (1) the interpretation of the order and (2) the question whether the particular advertisements violated the order present only questions of law. On this basis it refused to follow the decision of the Second Circuit and

created a conflict which only this Court can resolve.

Respectfully submitted,

NOBLE K. GREGORY
Counsel of Record
WILLIAM I. EDLUND
CHARLES R. RAGAN
KEVIN M. FONG

Counsel for
Petitioner

DAVID OTIS FULLER, JR.
WILLIAM S. BUSKER

Of Counsel

PILLSBURY, MADISON & SUTRO

Of Counsel